

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,578

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANNA ZAHABIAS, *Appellant*,

v.

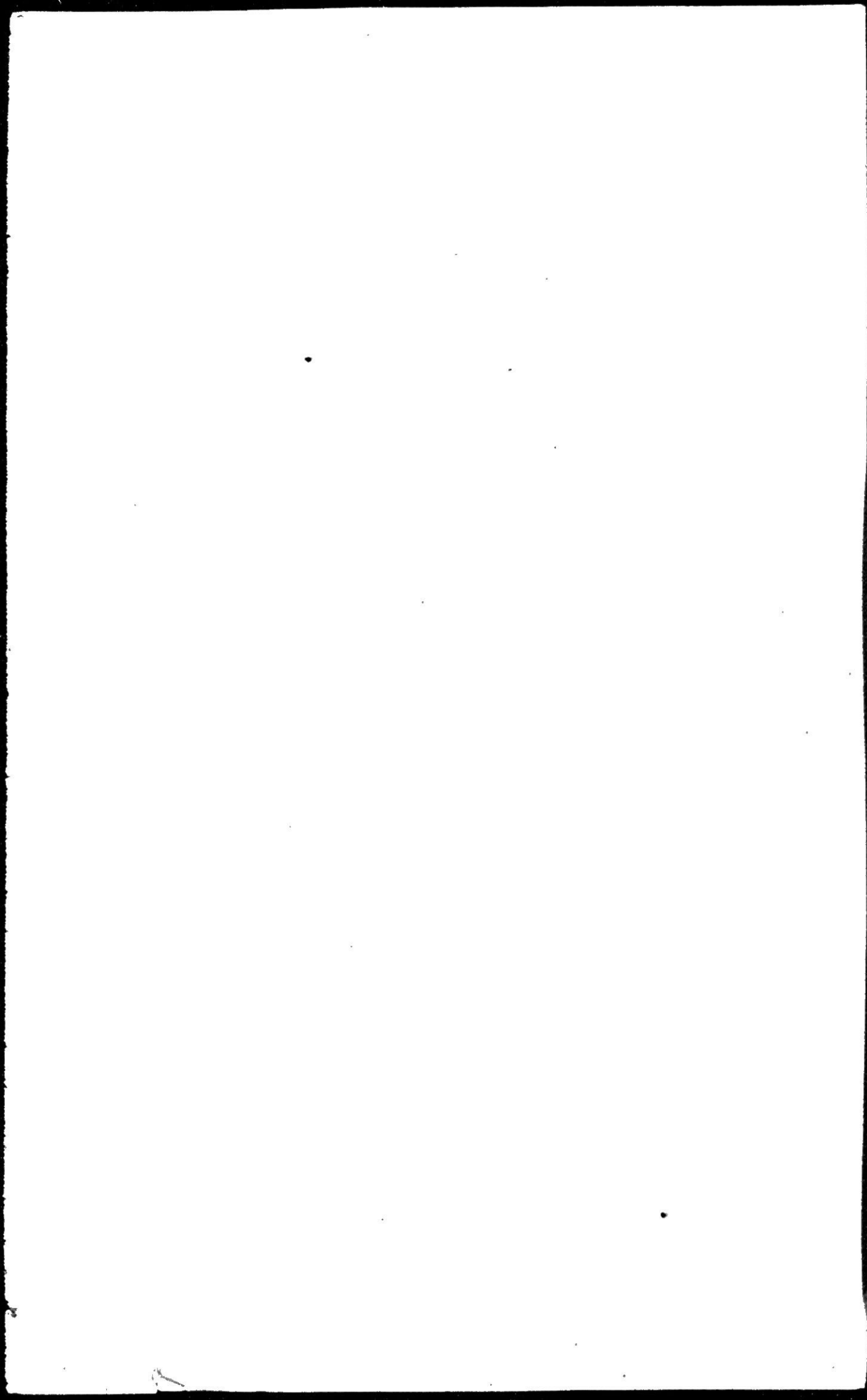
JAMES P. McGRANERY and ARGYLE MCKER, *Appellees*.

**Appeal from Judgment of United States District Court
Reviewing Decision For Deportation**

United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 24 1952

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CLERK

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No. 11,578

THE QUESTION INVOLVED

Did the District Court err in failing to find that the alien appellant had been denied due process of law in the conduct of the deportation proceedings below; or alternatively in failing to find there was no reliable, probative or substantial evidence in the record to support the warrant of deportation?

Appellant contends both of these questions require answers in the affirmative.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,578

ANNA ZAHARIAS, *Appellant*,

v.

JAMES P. McGRANERY and ARGYLE MACKEY, *Appellees*.

Appeal from Judgment of United States District Court
Reviewing Decision For Deportation

BRIEF FOR APPELLANT

4. JURISDICTIONAL STATEMENT

This Court has jurisdiction under the Act of June 25, 1948, c. 646, 62 Stat. 929; 28 U.S.C. sec. 1291.

The jurisdiction of the District Court rested upon the Immigration Act of February 5, 1917, as amended, sec. 25, 39 Stat. 893; 8 U.S.C., sec. 164; the Declaratory Judgment Act of June 14, 1934, as amended, c. 646, 62 Stat. 964, c. 139, sec. 111, 63 Stat. 105; 28 U.S.C. sec. 2201; and the Administrative Procedure Act of June 11, 1946, c. 324, sec. 10, 60 Stat. 243, 5 U.S.C. sec. 1009.

5. STATEMENT OF THE CASE

Appellant is an alien woman, a native and national of Great Britain (England). She entered the United States on June 22, 1913, was legally admitted for permanent residence, has remained continuously within this country and resides permanently in Masillon, Ohio. She is married to a Greek alien. (P. 11A)

On August 4, 1937, there was issued and served upon her an immigration warrant of arrest on the charge "managing a house of prostitution". Thereafter, and continuing intermittently until issuance of deportation warrant on October 11, 1949, repeated hearings and re-hearings have been conducted, at which certain charges in addition to that in the arrest warrant were lodged and some later abandoned. Appeals were taken to the Board of Immigration Appeals,—the appellant being released on bond. (Dept. file)

On August 7, 1947, the said Board issued a formal ruling that appellant, in the proceedings theretofore, had been "denied certain rights of due process", invalidated all prior proceedings, ordered the outstanding order and deportation warrant withdrawn and proceedings conducted *de novo*. (Dept. file by date) No new arrest warrant stating the charges in the *de novo* proceedings ever has been issued, but hearings were conducted and deportation warrant was issued October 11, 1949,—containing a ground never theretofore charged.

On March 21, 1950, the said Board issued a ruling, again ordering *de novo* proceedings on the ground such action was required by the Supreme Court's decision in *Sung v. McGrath*, 70 S.Ct. 445. Then, on July 5, 1950, the said Board issued another ruling, this time withdrawing its decision and order of remand dated March 21, 1950, and affirming the order of October 11, 1949. (Dept. file by date.) Complaint for declaratory judgment, etc., was filed in the District Court July 18, 1950, on the then

record, asking review and judgment that appellant was not subject to deportation because of denial of due process of law and total absence of any direct, positive or substantial evidence to support the charges. (P. 2A) In their answer, filed November 22, 1950, defendants admitted (P. 10A, par. 10) the deportation warrant contained a ground not in the arrest warrant nor ever lodged. After this admission and while the case was at issue in court, an entirely new deportation warrant, the third, was issued December 7, 1950.

After pretrial proceedings, (P. 11A) the case was submitted on motions for summary judgment. (PP. 13A-15A) On May 12, 1952, there was filed the Memorandum of Court that the complaint be dismissed, with reluctance on the part of the Court for reasons stated, (P. 15A) and on August 5, 1952, there was entered the Court's order granting summary judgment to the appellees here. (P. 16A) It is from this order the appellant here appeals.

6. STATUTES AND REGULATIONS INVOLVED

The following are material portions only of the statutes involved.

Act of Feb. 5, 1917, c. 29, sec. 25, 39 Stat. 893, 8 U.S.C. sec. 164:

"The district courts of the United States are invested with full jurisdiction of all causes, civil and criminal, arising under any of the provisions of this chapter."

The Immigration Act of 1917, as finally amended December 8, 1942, c. 697, 56 Stat. 1044; and July 1, 1948, c. 783, 62 Stat. 1206—neither of which changed the pertinent 1917 provisions (8 U.S.C. sec. 155):

"Deportation of undesirable aliens generally.

"(a) * * * any alien who shall be found an inmate of or connected with the management of a house of

prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import or shall attempt to import any person for purposes of prostitution or for any other immoral purpose; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported."

The Administrative Procedure Act, June 11, 1946, c. 324, sec. 2(f), 60 Stat. 237, 5 U.S.C. sec. 1001:

"(f) 'Sanction' includes the whole or part of any agency (1) * * * condition affecting the freedom of any person * * * (3) imposition of any form of penalty * * * (7) taking of other compulsory or restrictive action. * * *"

Ibid: sec. 7, 5 U.S.C. sec. 1006:

"(c) * * * no sanction shall be imposed * * * or order be issued except * * * as supported by and in accordance with the reliable, probative, and substantial evidence. * * *"

Ibid: sec. 10, 5 U.S.C. sec. 1009:

"(e) So far as necessary to decision and where presented the reviewing court * * * shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be * * * (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; * * *"

8 Code of Federal Regulations, part 1506:

"(c) *Procedure; notice of charges; * * ** At the beginning of a hearing under a warrant of arrest, the presiding inspector shall (1) permit the alien to inspect the warrant of arrest and inform him of the charges contained therein by repeating them verbatim and explaining them in language which will clearly convey to the alien the nature of the charges he must answer; * * * (5) enter of record as an exhibit, identified by number, a copy of the foregoing warrant of arrest. * * *

"(1) *Additional charges.* If, during the hearing, it shall appear to the presiding inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is subject to deportation, he shall notify the alien that such additional charge is lodged against him, and shall proceed with the hearing upon such charge in like manner as on charges contained in a warrant of arrest."

7. STATEMENT OF POINTS

- (a) There was denial of due process of law by unfairness in the administrative handling of the proceedings, in
 - (1) Long delay
 - (2) Juggling of statutory charges
- (b) There was error in law in
 - (1) Basing the deportation warrant upon formally invalidated hearings.
 - (2) Failing to issue a new warrant of arrest.
 - (3) The absence of reliable, probative and substantial evidence.
 - (4) Issuance of a new deportation warrant after the case was at issue in court.
 - (5) The District Court's holding as to its jurisdiction to cancel.

8. SUMMARY OF ARGUMENT

1. There was unfairness amounting to denial of due process of law in the unreasonably long delay in disposing of the case.
2. There was such unfairness as well as illegality in the juggling of statutory grounds and inserting one in the deportation warrant never charged in the proceedings.
3. There was error in the deportation warrant and order being based upon evidence taken in formally invalidated hearings.
4. The original arrest warrant was *functus officio* upon the invalidation ruling and no new warrant ever issued as required.
5. In the *de novo* proceedings, there is no direct, positive, or substantial evidence to support the two grounds stated in the deportation warrant.
6. The issuance of a "substitute" deportation warrant after this suit was at issue in court, was beyond the jurisdiction of appellees.
7. The District Court did have jurisdiction to cancel the proceedings and release the appellant.

9. ARGUMENT

1. There was unfairness amounting to denial of due process of law in the unreasonably long delay in disposing of the case.

The facts upon which this case rests occurred in 1936—sixteen years ago, and the long series of hearings began in March, 1937, over fifteen years ago. (P. 15A) No hearings whatever were held from June, 1938 to November, 1946, a period of eight years. Then in August, 1947,

all prior proceedings were invalidated and proceedings ordered *de novo*—ten years after the first hearing. (Ex. file, August 7, 1947)

While in *U. S. ex rel Janavaris v. Nicolls*, 47 F. Supp. 201, the primary question was compelling the Attorney General to release on bail an alien ordered deported because the deportation warrant had been held an unreasonable time without being executed, the secondary question was whether "such an unreasonably long period of time" had elapsed "that the warrant has lost its efficacy",—was *functus officio*. A question arose as to impossibility of executing the warrant due to war conditions, an attempted excuse advanced here but without merit, as shown below. The Court said this question of unreasonable delay was more important than the so-called primary question there. It considered the cases as holding that *one month to four months was reasonable in peacetimes*. In the present case, the first deportation warrant was issued July 12, 1938,—invalidated by the Board *nine years* later with all prior proceedings. Fifteen months after the invalidated warrant, or on October 11, 1949, another deportation warrant issued (Ex. file that date) admittedly containing a ground never charged (P. 10A) and therefore invalid; and finally on December 7, 1950,—*twelve years and six months* after the first deportation warrant, and after this suit was filed, the third warrant issued. (Ex. file that date) Considering that the first hearing was held March 11, 1937, this alien has been in technical custody and continually under the threat of deportation for *fifteen years*. A deportation warrant had been issued in 1938 (Ex. file) outstanding for eight years, with the alien under bond and always available.

Then two hearings were held in early 1948 and after more than a year (October, 1949), the deportation warrant attacked here was issued. In March, 1950, the Board of Immigration Appeals again ordered hearings

de novo under the *Sung* decision only to revoke its order in July, 1950. (Ex. file those dates) For thirteen full years therefore this alien has been held under bond, again and again subjected to trials and meeting various charges lodged, only to be later abandoned.

As stated by the District Court in its "reluctant" holding, she has been a resident here since 1913, and obviously is a woman of advanced years whose record in recent years apparently has been very good.

U. S. ex rel Chu Leung v. Shaughnessy, 88 F. Supp. 91, cited *Janavaris* and the principle that an unreasonably long delay justified enlargement of the alien,—even though Chu Leung went to the court in *habeas corpus* rather than under the Nationality Act and himself had been responsible for the long delay.

That where the Government fails to effect deportation within a "reasonable time", the courts will discharge the alien, see *Carancia v. Nagle*, 28 Fed. (2d) 955, 957. In *U. S. v. Parsons*, 22 Fed. Supp. 149, it was held that where deportation warrant was not executed within a reasonable time and no excuse for long delay appeared, the warrant became *functus officio*, and the fairness of the entire series of hearings was a proper question on review to determine lack of due process. There the warrant of arrest was issued and served in April, 1919; alien was re-arrested in 1921; new arrest warrant issued July, 1930, but cancelled at hearing in November, 1930; alien was re-arrested in November, 1937.

That deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process, see *U. S. ex rel Vajtaver v. Commissioner*, 273 U. S. 103, 47 S. Ct. 302.

That a multiplicity of hearings is an irregularity in the procedural features of deportation, see *U. S. ex rel Schladzien v. Warden*, 45 Fed. (2d) 204, 206.

Appellees attempted to excuse the long delay here on the ground the war prohibited the deportation. The first deportation warrant issued July 12, 1938. The second issued October 11, 1949—upon which the suit was based. Germany surrendered in May and Japan in September, 1945. Traffic to England was simple.

It is submitted that for this reason (long delay) alone, there was unfairness amounting to denial of due process of law and the District Court in effect has found the long delay. (P. 15A).

2. The juggling of statutory charges was so unfair as to constitute denial of due Process.

There are eight distinct and separable classes in the deportation statute relating to prostitution: (summarized) 1. inmate; 2. connected with the management of a house; 3. practicing; 4. receiving or sharing earnings; 5. managing or employment in, by or in connection with a house, dance hall, etc.; (distinct from #2) 6. assisting; 7. protecting or promising to protect from arrest; and 8. importing. The arrest warrant charged "managing a house of prostitution". The deportation warrant (October 11, 1949) against which this suit was directed, makes no mention of "managing a house of prostitution", but the ground stated therein is "managing a music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather." The Chief Examiner's report of October 11, 1949, (Ex. file that date) approved by the Acting Commissioner, holds the appellant is not deportable for "being connected with the management". This is the report which added the "inmate" charge, but the deportation warrant based thereon substituted the "practicing" charge—which never had been theretofore mentioned. This was the final and outstanding deportation warrant when suit was instituted in the District Court on July 18, 1950. When

that suit brought the admission in the pleadings (P. 10A) that this warrant was illegal, appellees—while the case was in court and therefore out of their jurisdiction, proceeded to issue a substitute deportation warrant, juggling out the “practicing” charge and juggling back in the “inmate” charge. (Ex. file that date) The present suit rests upon the irregularity and illegality of the deportation procedure to the time suit was instituted, and we insist that it shows extreme confusion, caprice, arbitrariness and an utter disregard for regularity.

Starting in 1937 with one warrant charge, “managing a house of prostitution”, at the first hearing there was added “being an inmate”. The Board of Appeals and Review issued a formal ruling (August 7, 1947) that plaintiff “was denied certain rights of due process” and ordered proceedings *de novo*. This August 7, 1947 ruling, the Board later ruled (March 21, 1950) “invalidated all prior proceedings”. No new warrant of arrest stating the charges for the *de novo* proceeding was, or ever has been issued. Without the warrant, three new charges were lodged orally: “being an inmate”, “assisting” and “being connected with the management of a house”. (All of these three were juggled out before the deportation warrant of October 11, 1949.) Then the Board again remanded the case under the *Sung* decision.

Kessler v. Strecker, 59 S.Ct. 694, 307 U.S. 22, 83 L.Ed. 1082, one of the leading cases on deportation processes and decided in 1939, recognizes that the various clauses of the deportation section are distinct and each constitutes a separate charge.

No decision better than *Takeo Tadano v. Manney*, 160 Fed. (2d) 665, demonstrates the point that the administrative officers cannot, in the order or warrant of deportation, substitute a charge which, though not lodged, is believed by them to be preferable:

"The position of the government in this proceeding amounts to the notion that an alien admitted to this country legally may be deported under any fact known to the Board of Appeals, which in its opinion makes his stay here illegal. * * *

"The alien's stay in this country, *after legal entry*, is not so precarious, and his deportation cannot be legally ordered through the course taken by the Board of Appeals. Of course, an alien's presence in this country is by the grace of this country. When, however, a hearing is had under a statute requiring a hearing, the hearing must conform to fair practices as they are known in Anglo-Saxon jurisprudence. The alien must be informed of the *factual* nature of the cause for seeking his deportation, and *the order following the hearing must be based upon the charges made and must be consistent with the evidence adduced relevant to them*. None of these requirements were observed in this case." (Italics supplied.)

The alien there was ordered released. The following is from the footnotes to the opinion:

"Requisites of a fair hearing: Orders by administrative boards, after hearings, can be justified only by the adherence of the hearing officers to basic principles and standards which constitute the genius of our jurisprudence. Some principles are designed to protect life, liberty and property of the individual in accordance with the American standard. They are the 'inexorable safeguard' of quasi judicial procedure. *Morgan v. U.S.*, 304 U.S. 1, 14, 15, 58 S. Ct. 999, 82 L. Ed. 1129; *St. Joseph Stockyards v. U.S.*, 298 U.S. 38, 73, 56 S.Ct. 720, 80 L. Ed. 1033. * * *

"A reviewing body has no right to consider issues outside the scope of the complaint, and is limited to matters charged therein. *Schneiderman v. U.S.*, 320 U.S. 118, 159, 63 S. Ct. 1333, 87 L.Ed. 1796. This case applies the principle to cases in which personal status is involved as well as in criminal actions. * * *" (The footnotes proceed with numerous other citations and sound doctrine.)

In the present case the deportation warrant does include a ground involving personal and private misconduct

(practicing prostitution), which not only had not been charged but was directly contrary to the testimony of every government witness, as shown below under subject title 5.

Few decisions demonstrate the necessity for a strict adherence to the exact wording of the statutory charges as *Throumoupolou v. U.S.*, 3 Fed.(2d) 803. There the warrant of arrest charged entry "without a properly visaed passport" but the deportation warrant charged the alien had "presented a passport issued for the use of and in the name of another person". The District Court ruled the warrant of deportation was valid, but the Court of Appeals reversed and ordered the alien discharged.

Paraphrasing the Supreme Court's holding in *Bridges v. Wixon*, 65 S.Ct. 1443, 326 U.S. 135, 89 L.Ed. 2103, as to the term "affiliation" in the deportation statute, Congress did not employ the term "manage" or "practicing" in a broad, fluid sense that would visit a hardship on an alien for slight or insubstantial reasons. The Supreme Court there held that where the fate of a human being is at stake, citing deportation, the presence of an essential evil purpose may not be left to conjecture. To construe the terms "managing" and "practicing" as applying to the plaintiff's conduct as shown by the record is to give those terms the "too loose" meaning which the Supreme Court condemned in the *Bridges* decision.

That these statutes must be strictly construed, see *U.S. ex rel De George v. Jordan*, 183 Fed.(2d) 768, citing *Delgadillo v. Carmichael*, 332 U.S. 388 and *Fong Haw Tan v. Phelan*, 333 U.S. 6. In *Delgadillo*, the Supreme Court said:

"Deportation can be the equivalent of banishment or exile. See *Bridges v. Wixon*, 326 U.S. 135, 65 S. Ct., 1443, 1449, 89 L.Ed. 2103. The stakes are indeed high and momentous for the alien who has acquired his residence. We will not attribute to Congress a purpose to make his right to remain here dependent

on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized."

Further, that the specific statutory provisions may not be ignored, see *Sibray v. U.S.* 282 F. 795 and *Johnson v. Tertzag*, 2 Fed.(2d) 40.

Any doubts as to whether an alien is within such a statutory classification must be resolved in favor of the alien. See *Fong Haw Tan*, *supra*, where the Supreme Court, on p. 376, holds:

"We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo v. Carmichael*, 332 U.S. 388, 68 S. Ct. 10. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by *the narrowest* of several possible meanings of the words used." (Italics supplied.)

We have shown that "unfairness" constitutes denial of due process. In *U.S. ex rel Castro-Lousan v. Zimmerman*, 94 F. Supp. 22, the Court held that where there has been shown a denial of due process in a deportation hearing, "any action * * * based on such a hearing is a nullity." There is no question that the final action in the present case was based in part upon hearings which had been invalidated, yet were incorporated into the subsequent hearings even though the testimony of the same witnesses conflicted in the two sets of hearings. See Lloyd and Grether testimony comparisons under subject 5, *infra*.

3. Use of evidence introduced at hearings later formally invalidated.

The report of the hearing of February 10, 1949 (Ex. file, that date) (long after the invalidation of the proceed-

ings) shows that the entire record was reviewed completely. The report and recommendation of Chief Examiner Devaney of October 11, 1949 also shows on its face that the entire file was used. The memorandum of the Acting Commissioner of July 14, 1947, (saying "this alien's mere residence in the house" was not sufficient) shows that the invalidated evidence consisted of the testimony of the two police officers and the police registration records (testimony they both altered materially in the new hearings). But the final decision of the Board of Immigration Appeals dated July 5, 1950 shows acceptance completely of the invalidated evidence and rejection of the more favorable later testimony by the same witnesses. (Ex. file) This is covered in detail under subject 5, *infra*.

That proof outside the record cannot be used to deport an alien, see *U.S. v. Uhl*, 210 F. 860. We say the record must be limited to the de novo proceedings and not include what happened theretofore. This point is treated in the next following subject more in detail.

4. The original warrant of arrest was functus officio as to the de novo proceedings.

This point is directed squarely at the denial of due process, entirely apart from such denial due to unreasonably long delay and juggling of charges. It must be understood clearly that, like an indictment in a criminal case, the warrant of arrest is the indispensable starting point in deportation proceedings where an alien already is in the country. The first step in the first hearing (after arrest thereon) must be the reading of the warrant charges to be met. The Regulations prescribe a detailed procedure for the procurement, issuance and service of a warrant of arrest. 8 C.F.R. part 150, pars. 150.1 et seq. Par. 150.6(a) recognizes that the hearings shall be based "on the charges stated in the warrant of arrest". See also 150.6(c) showing copy of warrant to be part of the

record of the proceedings. The Board, in its decision of March 21, 1950, and referring to its order of August 7, 1947, says: "This order in effect invalidated all prior proceedings." How the initial and basic move upon which the proceedings start could survive when all of the "proceedings" fell is difficult to rationalize.

Harisiades v. Shaughnessy, 187 Fed.(2d) 157; 72 S.Ct. 512, raises the question, but fails to answer it, whether the proceedings are initiated by issuance of the warrant or its service. *De novo* means "as though no previous action had been taken". *Spano v. Western Fruit Growers*, 83 Fed.(2d) 150, 152. It means "the whole case". *Palvis v. Jackson*, 131 Fed.(2d) 362, 363. We say new proceedings must start at the formal beginning—a new warrant reciting the charges to be met. It is the formal charging upon which all thereafter rests except where additional charges are "lodged". It is the process upon which, without further ado, a person may be and frequently is confined or placed under bond. No amendment to or change in the warrant of arrest by the immigration service was necessary in the *Harisiades* case, for, as the Supreme Court holds, Congress had made a statutory change and the alien there already had admitted the fact necessary to meet that change.

One very important feature of this subject is our contention that, being "*de novo*", the new proceedings, under the August 7, 1947 order, were "instituted" or "initiated" subsequent to the passage of the Administrative Procedure Act (June 11, 1946, 5 U.S.C. sec. 1001) and prior to the act of September 27, 1950 (P. L. 843, 81st Cong., 2nd Sess. 64 Stat. 1048), relied upon in the *Harisiades* decision, and which latter act provided only that, *thereafter* deportation proceedings need not conform to the Administrative Procedure Act as the Supreme Court decision in *Sung* had held they must. The Government's position is that because the arrest warrant survived the invalidation, (which we deny) our proceedings were "initiated"

prior to the Act. We say that because the warrant was *functus officio*, the proceedings were instituted after that act. A new warrant was required.

After all, the Administrative Procedure Act created no new rights, but merely provided mechanical formulae for better insuring fairness and therefore due process. The history of the act as outlined in the *Sung* decision so shows. We are concerned with fundamental rights which are older than our Constitution but had been disregarded to the point where Congress had to more clearly set up specific prescriptions.

The Board's final decision attempts to evade this point by calling the *de novo* proceedings "reopened hearings". Its order of August 7, 1947 was for *de novo* "*proceedings*" and it later held that this order "invalidated all prior "*proceedings*" (March 21, 1950).

On the same day the Supreme Court decided *Harisiades*, and immediately following that decision, the court decided *Carlson v. Landon*, 72 S. Ct. 525, which (without mention of *Harisiades*) *does* relate to the question of the warrant. Only that portion of this latter decision as relates to one Zydok is of interest. He was arrested in August, 1949, on a warrant of arrest for deportation. He was released on bail. Later a hearing was held. Still later, the *Sung* decision necessitated a second hearing. After September 23, 1950, the effective date of the Internal Security Act of 1950, which provided that "hereafter" deportation proceedings need not be within the Administrative Procedure Act, Zydok again was arrested *on the same 1949 warrant of arrest and held without bail*. He sued for a writ of habeas corpus, the District Court (94 F. Supp. 338) denied his petition. The Court of Appeals (187 Fed. (2d) 802) reversed. The Supreme Court at page 537, held:

"While the Attorney General has made a satisfactory showing that he has good cause for detaining

Zydok without bail, *no order based on a new warrant has been entered.*" (Italics supplied.)

The Supreme Court (p. 538) ordered the release of Zydok "unless within a reasonable time in the discretion of the Court *he is rearrested under a new warrant*".

In *Kessler v. Strecker, supra*, the District Court had held that the charges in the warrant were not supported by the evidence, but dismissed the writ of habeas corpus. On appeal, the Circuit Court of Appeals remanded the case to the District Court with directions to try the issues *de novo*. The Supreme Court says (p. 700) this was error, stating:

"If the hearing was fair, if there was evidence to support the finding of the Secretary, and no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside." * * *

"It follows from what has been said that, as the Secretary erred in the construction of the statute, the writ must be granted and the respondent discharged from custody."

In the present case there is abundant evidence that the hearing was and is unfair. This is established beyond question by the record which now shows that not once but twice has this case been remanded for proceedings *de novo* because of official admission that there has been denial of due process.

That once the prior proceedings are invalidated the immigration service may start proceedings again but *must issue a new warrant*, see also *U.S. ex rel Chumura v. Smith* (Dist. Ct.) and affirmance thereof by CA-2 in 29 Fed.(2d) 287.

The *Janavaris* decision dealt with in detail *supra* is important on this warrant subject, as well as the un

reasonable delay which would invalidate a deportation warrant.

On this point alone the District Court should have found there was a denial of due process of law.

5. In the de novo proceedings, there is no reliable, probative or substantial evidence to support the two charges in the deportation warrant.

That it is the duty of the Circuit Court of Appeals itself to examine the proceedings and proofs to see if substantial evidence existed to support the findings in deportation cases, see *McCandless v. U. S. ex rel Rocker*, 30 Fed. (2d) 652, followed in *McCandless v. Kloten*, 31 Fed. (2d) 1016.

In opening this subject it must be remembered that the deportation warrant outstanding when this suit was entered was the one issued October 11, 1949—the two grounds (to be carefully noted) are:

- (a) "managing a music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather;" and
- (b) "practicing prostitution".

These are the 5th and 3rd of the eight statutory charges itemized under subject 2 *supra* on "juggling". The Government has admitted (as shown) that charge (b) was an error. Note that the original warrant charge was "managing a house of prostitution".

But these (a) and (b) charges are the ones, exclusive of all others, to support which there must be found some reliable, probative or substantial evidence in the record. We insist no such evidence exists. The clause relating to "music or dance halls or other places of amusement, or resort" obviously was meant to cover public places where "procurement" was practiced.

Deportation being a sanction, must be so supported according to the quotation from the Administrative procedure Act.

That the evidence must be substantial, see *Skeffington v. Katzeff*, 277 F. 129; *Fong Tan Jew. ex rel Chin Hong Fum v. Tillinghast*, 24 Fed. (2d) 632; *Hays v. Sesto*, 12 Fed. (2d) 698; *Morrow v. Tillinghast*, 35 Fed. (2d) 183; *Keating ex rel. Mello v. Tillinghast*, 24 Fed. (2d) 105; and *Bata Shoe Company v. Perkins*, 33 Fed. (2d) 508.

That terms used in deportation statutes must be strictly construed already has been shown. (See page 10, *supra*) In *Tulsidas v. Insular Collector of Customs*, 43 S. Ct. 586, 588; 262 U.S. 258, 264 (an immigration case), the Supreme Court accents the particularity of the immigration law "in regard to its distinctions". It especially distinguishes a "manager" from a "partner". Under *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 60 S. Ct. 937, 943; 310 U.S. 268, 279, "management" connotes "direction and control" for the purposes for which the properly managed is used. Under *Whiteman v. Rhode Island Insurance Company*, 78 F. Supp. 624, 626, it means "direction and physical or manual control". Nowhere in the record of the present case is there even a suggestion this alien had any "direction or control", physically, manually or otherwise, over the operations or "purposes" of "a music or dance hall or other place of amusement or resort" or even over Stolich's rented quarters or inmates. The fact she lived in a separate part of the house, with a separate entrance, and was the only person the officers could find around, most certainly would not make her a *manager of operations*. The testimony is she never mingled with Stolich's tenants, nor cooked for, visited, nor had anything to do with them. Again it is insisted that the prescriptions of the Supreme Court in the many decisions cited be followed and, unless the

alien can be brought within the statutory term, she must be released. We say there not only was no substantial, reliable or probative evidence of managing,—there was *no* evidence of management.

Svarney v. U. S., 7 Fed. (2d) 515, is directly in point here. There the alien had entered a plea of guilty to an indictment charging (1) causing a woman to be transported in violation of the Mann Act and (2) procuring railroad transportation for her. He was sentenced to jail. Immigration warrant of arrest charged he (1) was employed in or in connection with a house or music hall, etc. where such women gather, (2) protecting such a woman, etc., and (3) receiving, sharing or benefitting from her earnings. At the hearing the 4th charge of "assisting" was lodged. The 2nd and 3rd charges were abandoned at the end of the hearings. The evidence was testimony of an F.B.I. agent and the defendant, an affidavit of the woman and a copy of the commitment in the case under the Mann Act. The first item thrown out by the Court was the woman's affidavit,—since there was no showing she was not available for cross-examination; the next thrown out as not being direct or substantial was the F.B.I. agent's testimony as not showing the "connection" or "employment" in a house of the character stated in the statutory terms. Then the Court threw out the record papers on the Mann Act case (similar to those in the record here) on the following grounds: (p. 518)

"Conceding, but without deciding, that * * * (they) * * * were properly received in evidence, yet they do not tend to support either of the findings upon which the warrant of deportation was based, but *related to entirely different offenses*. A comparison of the charges in the indictment with the findings in the warrant of deportation demonstrates this beyond controversy. Our further conclusion must therefore be that there was no substantial evidence in the record to support the findings in the warrant of deportation."

This is but to say that evidence that two women engaged in illicit business in rooms they rented from a man who rented from this alien's husband,—but she never entered the quarters, had anything to do with the practices and could have legally been thrown out had she entered—such evidence cannot sensibly be held as establishing that *she* was “managing” or “employed in” the business of the quarters. It also is to say that her plea of guilty as an absent and third party in a conspiracy in which her husband and another man illegally transported a woman to *his* house,—is no evidence of such “managing” or “being employed in” etc. the business practiced thereafter. *Not a solitary incident of practicing, soliciting, collecting or other act is shown anywhere in the record. This allegation is categoric.*

The facts in the present case are similar to those in *Meir v. Labaris*, 23 Fed. (2d) 187, where the Circuit Court of Appeals for the Eighth Circuit affirmed the District Court in sustaining a writ of habeas corpus. There the alien was a woman who had a large house and rented separate rooms. Three women tenants and her servant were arrested as prostitutes and three police officers testified the place was a “resort for prostitutes”, etc. A deputy U. S. marshal and an immigrant inspector also testified for the Government. The immigrant inspector *relied upon the police records* showing arrests of prostitutes “*at the street number*”. The Courts held there was no evidence to support a charge that the alien knew of the tenants' actions, or had anything to do with *running* or *managing* their quarters, or ever participated in or received any of their earnings from prostitution.

Not a single witness here testified to any act of “managing”. Llovd could say no more than that the appellant was the only person he could find on the premises, therefore he told her to take the women down to register, which she did under protest. Grether testified he was

surprised when she walked in, and that he knew her only as the landlady. Categorically, it is insisted neither they nor any other witness has yet related this appellant to a single act of either management or individual immorality. (Ex. Jan. 29, 1948, pp. 12, 17)

This case is so far away from the cases intended to be dealt with, that a late typical case should be cited—*U. S. ex rel Kataliakos v. Jordan*, 179 Fed. (2d) 422. There the alien admitted that he knowingly permitted one room, in the hotel operated by him, to be used for purposes of prostitution, that he made a charge for the use of the room for that purpose; and permitted strange men to register for the room, as husband and wife, with women who were permanent guests in his hotel. This was "managing a house of prostitution" clearly. Compare this with the facts in the present case, which show absolutely no knowledge or participation in the business or knowledge of its existence on the premises occupied by a tenant of this alien's husband.

The file shows a memorandum of the Acting Commissioner dated July 14, 1947—the preliminary to the Board's order of invalidation of August 7, 1947. This memorandum takes precisely our position in this case—that *the mere residence of this alien in the house "is insufficient"*. Common sense realizes the husband heads a house—the evidence shows *he* paid the rent, collected the rent from Stolich; *he*, with Stolich, brought the woman from West Virginia to *his* house—where this alien, his wife, lived in their own separate quarters with separate entrance. This is the second tragic experience of this woman due to her marriage—another "conviction by association". The Commissioner is sensible when he says in effect mere enforced presence in one part of a building has no relation to either "managing" or being an "inmate" of someone's else separately rented quarters therein. Unfortunately the Commissioner did not abide by his own sensible

conclusion. He says in effect that a landlord or tavern keeper is a manager and inmate of the rented quarters.

Included in the "evidence" considered throughout is copy of an indictment of this woman as the third party in a conspiracy to violate the Mann Act and returned November 19, 1936, against her husband and his male tenant Stolich. This was introduced during the early hearings which were invalidated, along with her plea of guilty which she has testified was induced by false promises. She has protested consistently that, in spite of the plea, she was never guilty of the charge. At once it should be apparent that, even if this evidence was properly admitted, it could not form a basis for deportation. See *Meier v. Lebaris*, 23 Fed. (2d) 187. The bases in the deportation warrant of October 11, 1949 was "managing a music or dance hall", etc. and "practicing prostitution". The action of her husband and his tenant in transporting a woman over state lines and installing her in quarters in *his* own house but rented by her husband to the other man, cannot support the warrant charge that this appellant either *managed* the business of the inmate or *practiced* prostitution herself, and most certainly not a "music or dance hall", etc. Yet the final decision of the Board dated July 5, 1950, shows it so was used. We say it is not and could not be "reliable, probative or substantial" evidence of the warrant charges.

There is much conjecture and assumption because a house with two entrances had but one street address; but here the comments of the Supreme Court in *Bridges v. Wixon*, *supra*, are pointedly pertinent,—that "where the fate of a human being is at stake, as for example the deportation of an alien, the presence of an essential evil purpose may not be left to conjecture".

The record shows repeatedly that appellant lived with her husband in one part of his house, with a separate

entrance; that the other floor, with separate entrance, was rented to the man who did the transporting and who harbored the two women in his quarters; that appellant had nothing to do with the other part of the house, never went there, nor performed services nor had any contacts with the occupants; but that a police officer could find no one at the house except appellant and ordered her to take the two women to the station to be registered. They gave their street address and it was found to be the same as appellant's,—*ergo*, her husband's house was a "music or dance hall", etc. and she was the *manager*. This is the single and solitary basis upon which there rest the two charges.

The witnesses for the Government were Captain Grether and Officer Lloyd, both well acquainted with the neighborhood and vice conditions. A comparison of the testimony of these two Government witnesses at the invalidated and later hearings shows retractions, and in its final version no testimony of substance or directness to connect this plaintiff with either of the charges. Faced with his earlier testimony as to the police registration, Lloyd testified appellant lived in the rear of the building but was the only person he ever could find. Asked directly whether he knew whether any prostitutes lived there, he answered "I don't know whether they lived there or not." Shown his earlier statement in an effort to prove plaintiff herself was a prostitute, he said "This does not show that I had personal knowledge that she was a prostitute." Then occurred the following from this primary Government witness: (Ex. file, hearing of Feb. 10, 1949, p. 67)

Q. Did you know for a fact whether Mrs. Zacharias had supervision over these prostitutes in any way?

"A. Not for a fact, but she is the only woman I talked to.

"Q. But you cannot say for an actual fact, even on the basis of your investigation, or can you say, that this lady managed the house of prostitution there?

"A. I couldn't say as a matter of fact to nothing, but when I went on the investigation, she was the lady I talked to."

Captain Grether, principal witness for the Government, testified (Jan. 29, 1948, p. 26):

"I was surprised to see her come in (with the two women) because I considered her more of a landlady than a working girl."

On cross-examination, he testified:

"I never knew her as a prostitute. I knew her as a landlady."

Government witness Ernest M. Smith, patrolman, testified (Feb. 10, 1949, p. 37):

"I knew nothing of the lady's moral character."

There is nowhere in the record, and we challenge the appellees to show otherwise, a single witness showing even one act of plaintiff to support the inmate charge—even though, under the decisions, one proven commercial act does not constitute prostitution. Furthermore, the warrant of deportation charges also "practicing prostitution"—meaning personal, individual and physical actions on a commercial basis.

It is all too evident from the record as a whole that, knowing they could not deport her on the 1936 conspiracy charge because the statutes do not cover one offense, and knowing her husband had become a fugitive, the Service decided to "throw the whole book at *her* as an undesirable. Here again the holding in *U. S. ex rel Ciarello v. Reimer*, 32 F. Supp. 797, is pertinent, that however desirable the deportation of an alien may be, "it cannot be effected solely on the theory that the end justifies the

means''. The husband, who was responsible for all of her difficulties, returned to the country voluntarily and has been ordered deported on strictly technical charges *not involving any mention of prostitution or the Mann Act*. (See *Zacharias v. McGrath*, 105 F. Supp. 421).

Here is a woman of advanced age, lawfully admitted for permanent residence in 1913 and residing here constantly for approximately forty years,—a victim of the unfortunate circumstances that her husband used *his* car for an illegal transportation and brought a woman to rooms rented by a man in *his* home, which was occupied in the rear by this appellant,—so she is subjected to persistent, reckless, confused and arbitrary persecutions while both the Service and the Courts throw the mantle of complete legal protection over Communists and truly dangerous elements. (See *Bridges v. Wixon*, *supra*.) We say that had it not been for the one conspiracy charge—in which she was only the third and absent party,—no charge would have been or could be laid against this woman. In *Strench v. Pedaris*, 55 Fed. (2d) 597, 598, the CCA holds that the term "inmate" means inhabiting a house, taking part in the immoral practice carried on therein, or participating in the profit derived from the practice. (It released an alien husband whose wife practiced prostitution in their residence.)

That personal knowledge of a witness is required in such cases, see *Mouratis v. Nagle*, 24 Fed. (2d) 799. The Government's witnesses here have denied personal knowledge. The *Mouratis* decision is commended to the Court for study—since it would not accept even an inmate's testimony as to the owner of a house. It deals with "the legal impropriety of basing a vital finding of fact" upon an assumption. That the evidence must be directly to the specific point, see also *Katz v. Commissioner*, 245 F. 316, involving ownership of property used as in this case. That connection with the business being practiced is nec-

essary to be shown, see *U. S. ex rel Wlodinger v. Reimer*, 103 Fed. (2d) 435, and *Murino v. Zurbrick*, 52 Fed. (2d) 160. That knowledge is essential in these circumstances, see *U. S. ex rel. Rodriguez v. Karmuth*, 2 F. Supp. 664; *U. S. ex rel Tisi v. Tod*, 264 U. S. 131, 68 L. Ed. 590.

Entirely aside from the "reliable, probative and substantial requirements of the Administrative Procedure Act, the Courts long ago held that in deportation cases the evidence must be "substantial", (*U. S. ex rel Consola v. Karmuth*, 27 F. Supp. 461, affirmed in 108 Fed. (2d) 178); that it must be "ample" and "legitimate" (*U. S. ex rel Mastoras v. McCaudless*, 61 Fed. (2d) 366); and that it must be "direct and positive" (*U. S. ex rel Karpathion v. Schlotfeldt*, 106 Fed. (2d) 928 cert. denied at 309 U. S. 681).

Few Courts of Appeals have had as many occasions to consider deportation cases as that for the Second Circuit. In *U. S. ex rel Mittler v. Curran*, 8 Fed. (2d) 355, that Court affirmed the release of an alien woman, charged with being a prostitute, who had a police conviction and was found diseased and admitted the conviction. The Court considers the definition of prostitution as a habit or vocation, and refused to hold that the alien came within the term,—or the intention of Congress. The same Court held in *U. S. ex rel Jelic v. District Director*, 106 Fed. (2d) 14, that even an admission of having committed a crime, made under pressure, is not sufficient where the facts do not show the crime. This is important in considering the enforced registration by the Canton police. In the *Jelic* case, the Service also was overruled,—one of the bases being its failure to "bring out the actual facts."

This is not a case in which the Court is asked to consider *conflicting* evidence or to balance weights. There is no legal evidence in the record,—certainly none reliable, probative, substantial, direct or positive.

U. S. ex rel Mittler v. Curran, supra holds that an alien who clearly was shown to be living with a man other than her husband, though convicted and diseased, was not proven to be "practicing",—and intelligently and fairly giving to the word its real meaning. It is profitable reading—and is a complete answer to the charges in the deportation warrant. There also is commended to the Court the decision in *Meier v. Lebaris, supra*, the facts in which closely resemble those here. There the charges were (briefed) "receiving or sharing in earnings", "connected with the management of a house", and "employed in or connected with a house, dance hall, etc.". Five officers testified. The evidence showed the alien woman maintained a *rooming house*. Three women tenants and a servant were arrested as prostitutes and police charged *the premises* were a "house". The immigrant inspector testified he had examined the *city police records* of arrests at the address. The alien denied receiving any money from the women. One witness testified (as here) the alien was the *only person he ever saw there* (except the servant). Not a single witness testified against the individual practices of the alien (as here). The District Court, after reviewing the immigration record and hearing witnesses directly, sustained the writ,—and the Court of Appeals affirmed.

"Inmate" has been defined many times and applies only to one who is present more or less regularly and who plies the trade there. It does not include anyone else found on the premises. See *People v. Anonymous*, 292 N.Y.S. 282, 285. It means being in a house of ill fame for the purpose of engaging in prostitution. See *People v. Wright*, Cal. App. 79 P. 2d, 102, 107. It means inhabiting, taking part in the immoral practice carried on in the house, or participating in the profit derived from the practice. That as to this particular charge the evidence must be "direct and positive, see *U. S. v. Schlottfeldt*, 106 Fed. (2d) 928, 930. *Katz v. Commissioner*,

supra, held that the phrase did not include a *landlord* who leased to a prostitute the house in which she lived and practiced her occupation. See also *U. S. v. Brough*, 15 Fed. (2d) 377, 379. An examination of the cases cited above showed they contained specific misconduct evidence. Even where one act was shown, it was held not "practicing". *U. S. v. Curran*, 8 Fed. (2d) 355.

Even if there were doubt as to the evidence (and there appears none), that doubt must be resolved against deportation. *Browne v. Zurbrick*, 45 Fed. (2d) 931; and particularly the quotation from the Supreme Court in *Fong Haw Tan*, p. 12 *supra*.

Concluding this sub-subject, we contend that this Court, reviewing the proceedings and proofs under *McCandless*, *supra*, and with regard to the extreme severity of the proposed action as repeatedly warned by the Supreme Court (*Fong Haw Tan*, *supra* and others) should find that there was no direct, positive or substantial evidence to support the deportation warrant charges, either as to "managing", being an "inmate" or "practicing".

Concluding this subject, therefore, appellant insists there was no reliable, probative or substantial evidence in the record,—certainly none direct, to support either of the charges in the deportation warrant, and the District Court should so have found.

6. The issuance of a new deportation warrant after this suit was at issue in court, was beyond the jurisdiction of Appellees.

It is fundamental that judicial review of administrative action cannot be had until the administrative processes have been exhausted. When judicial action then is instituted, further administrative action is barred, and the courts have exclusive jurisdiction until their final determination. Act of February 5, 1917, c. 29, sec. 25, 39 Stat.

893; 8 U.S.C. sec. 164. The issuance of a deportation order concludes the administrative process as regards an alien's right to have deportation order reviewed by the courts. *U. S. ex rel Trimler v. Carusi*, 166 Fed. (2d) 457. The later dismissal in 168 Fed. (2d) 1014 on failure of proper substitution of parties is immaterial.

The record below shows complaint filed July 18, 1950, against the order and warrant of deportation issued October 11, 1949. The Government's answer, filed November 22, 1950, admitted error in the said warrant of deportation. No responsive pleading by plaintiff was called for or filed. Nevertheless and after the suit was at issue and out of their jurisdiction, appellees did issue a new deportation warrant on December 7, 1950, without any notice or copy to plaintiff's attorney of record, although inserted in the departmental file after the latter had been examined by counsel for both parties for preparation of their respective cases. It was not discovered until after the District Court had disposed of the case including the altered file, and while appellant's counsel was preparing the record for this appeal.

This Court should repudiate this illegal and highly reprehensible action,—which is but another evidence of the confused, arbitrary, capricious and unfair actions which have characterized this case from the start.

7. The District Court did have jurisdiction to cancel the Proceedings and Release the appellant.

The memorandum of the District Court (P. 15A) is striking in that after somewhat summarily, even though "reluctantly", dismissing all of the alien's contentions, it states that:

"If the Court had power so to do, he would order a suspension of the order of deportation, but there seems to be no authority in the Court to take such

action, this being a part of the administrative procedure."

One of the reasons so moving the Court was "the pertinent charges are about fifteen years old." The Court does not say it lacked jurisdiction to cancel the proceedings and enlarge the alien. It unquestionably finds unfairness.

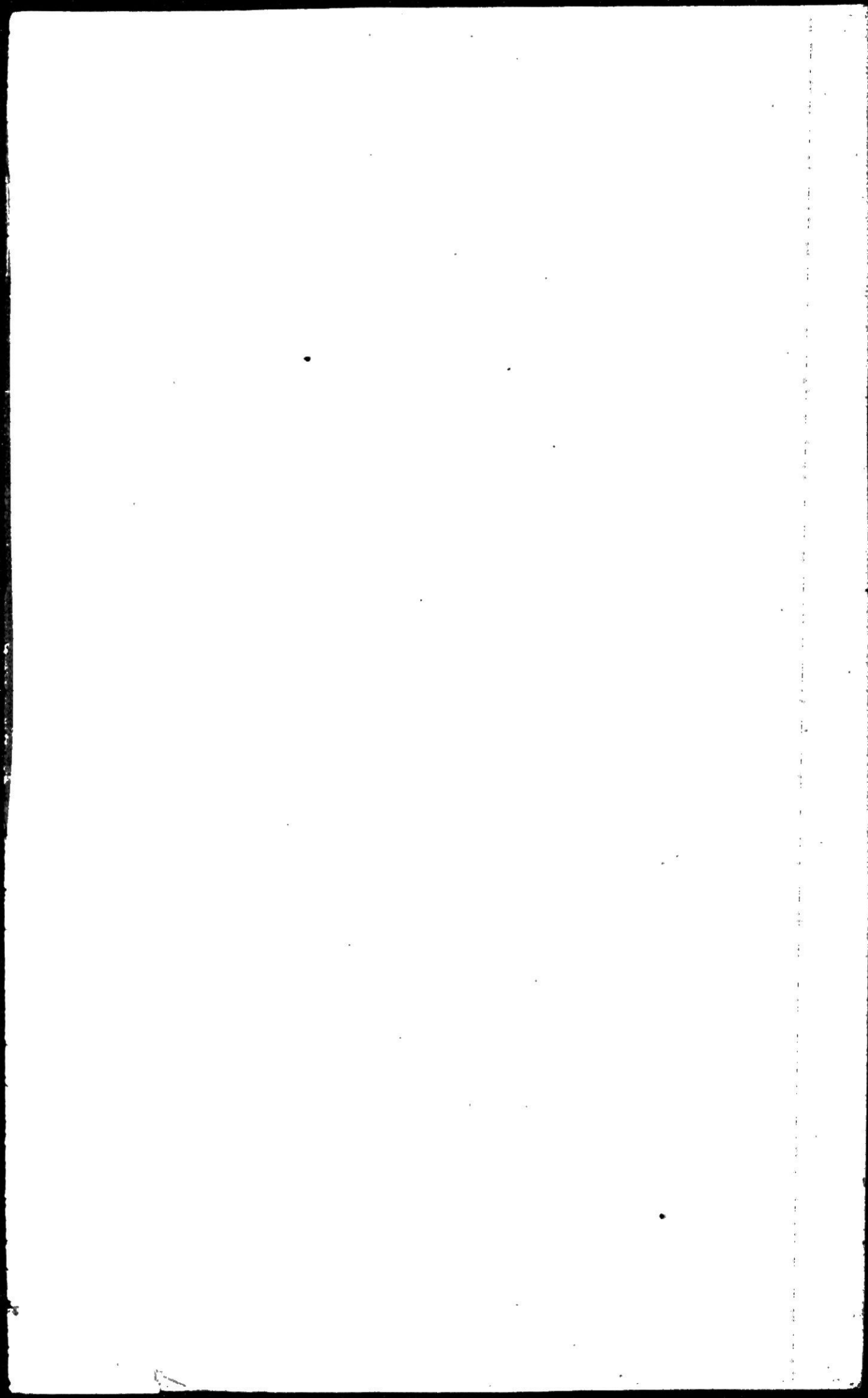
Inversely: While *suspension* of deportation is a purely administrative procedure under section 19(c) of the 1917 Act as amended, it is prohibited under 19(d) to so administratively suspend in cases arising under the "prostitution" clauses. It is true the Attorney General in a number of instances and independent of the formal records, has summarily closed cases where grave injustice or other considerations appeared. One of the most recent instances is the case of *Karl A. Latva*, unreported except in the press, in which Attorney General McGranery's action was: "I, as the chief law enforcement officer of this Government, can exercise my prerogative as prosecutor."

But the District Court *did* have jurisdiction to cancel the proceedings and release the appellant. Prior to the Declaratory Judgment Act (June 14, 1934), judicial review in deportation cases was limited to habeas corpus *after* confinement. But *any unfairness which would have sustained a writ for lack of due process, equally would support a declaratory judgment*. For this reason, certain of the decisions in habeas corpus cases are relied upon. In other words, whatever relief under habeas corpus was available to an *incarcerated* alien, under the Declaratory Judgment Act would be available to an alien *not confined*. We are dealing with jurisdiction here. The District Court clearly feels there is or has been unfairness although it declined to find denial of due process. It clearly feels this alien should have relief. We have shown

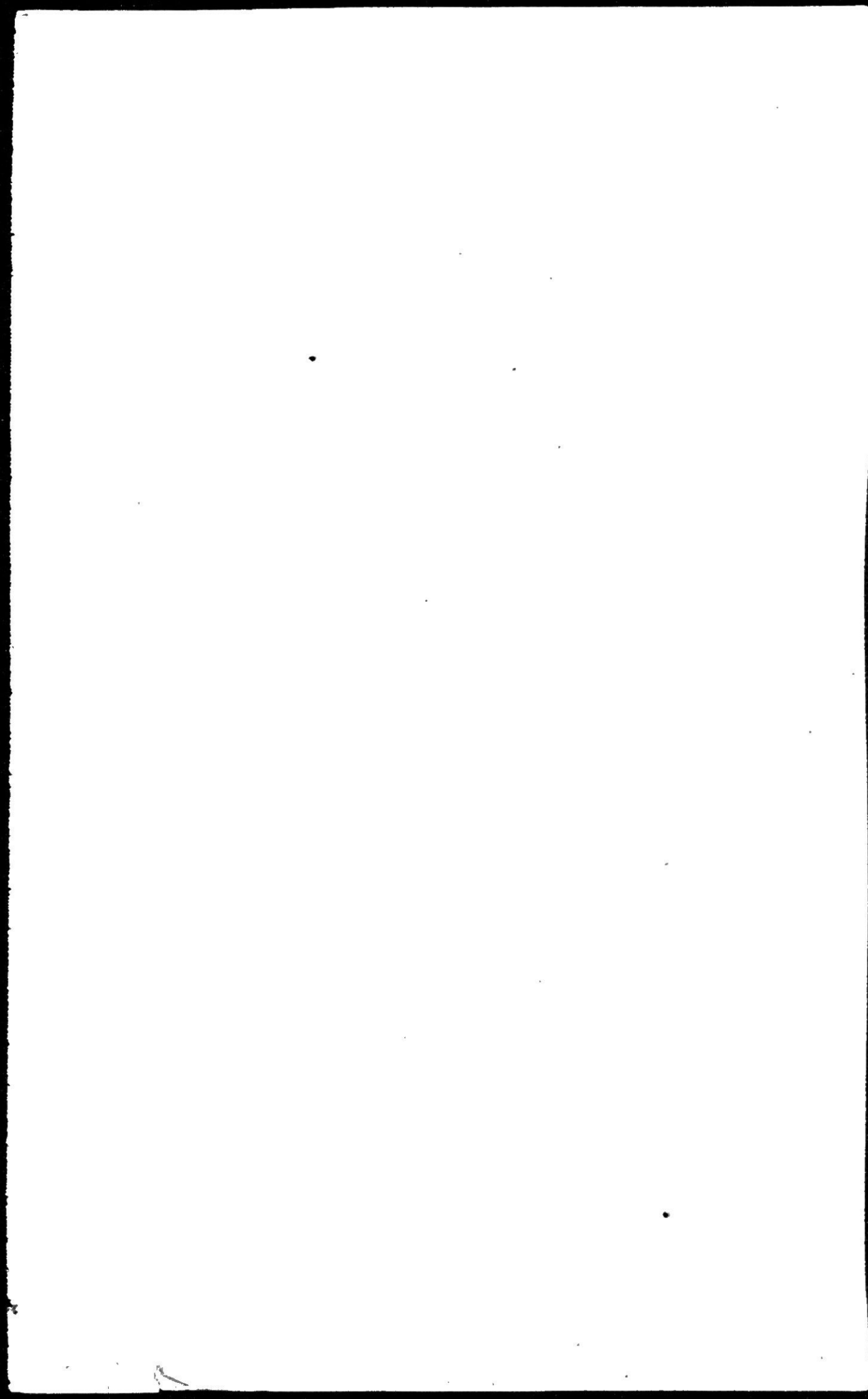
the Attorney General can grant that relief not under the suspension procedure, but only under his "prerogatives", —as to which we cannot disagree with him. It is unthinkable that relief cannot be obtained from the Court, therefore, when on the face of the court's memorandum relief is called for.

We ask this Court to hold that the District Court erred as to its jurisdiction and should have cancelled the proceedings and released the appellant.

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APPENDIX



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,578

ANNA ZAHARIAS, *Appellant*,

VS.

**JAMES P. McGRANEY, Attorney General,
ARGYLE MACKEY, Commissioner of Immigration
and Naturalization, *Appellees*.**

**Appeal from the United States District Court
for the District of Columbia**

JOINT APPENDIX

1 Filed Jul 18 1950 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

ANNA ZAHARIAS, Alias Zacharias, 1222 Fourth Street,
S. W., Massillon, Ohio, Plaintiff

vs.

J. HOWARD McGRATH, Attorney General, and AR-
GYLE MACKEY, Acting Commissioner of Immigra-
tion and Naturalization, Defendants.

Civil Action No. 3087-'50

*Complaint For Declaratory Judgment, Injunction and
Mandate*

The plaintiff alleges that:

1. This Court has jurisdiction of this action under the Immigration Act of February 5, 1917, as amended, and particularly section 25 thereof (8 USCA sec. 165); the Declaratory Judgment Act approved June 14, 1934, as amended (28 USCA, sec. 400); and the Administrative Procedure Act approved June 11, 1946, and particularly sections 9(a) and 10 thereof (5 USCA, sec. 1008(a), 1009).

2. At all times material hereto, the Honorable J. Howard McGrath, Attorney General, and his predecessors in office (hereinafter referred to as the Attorney General) have had administrative supervision and control over the enforcement of the laws relating to immigration and of proceedings for deportation of aliens, including such proceedings against plaintiff as are set forth herein. During all of said time, the Commissioner of Immigration and Naturalization, said office being now vacant but the duties thereof being performed by Honorable Argyle Mackey as Acting Commissioner, and his predecessors in said

office, (hereinafter referred to as the Commissioner) under the direction of the Attorney General, have had supervision and direction of the enforcement of such laws and the conduct of such proceedings, including deportation proceedings against plaintiff as set forth herein.

3. Plaintiff is a native and citizen of Great Britain. She entered the United States at the port of New York, New York, on June 22, 1913; was lawfully admitted for permanent residence, has remained continuously within this country and permanently resides at Massillon, Ohio, with her husband, Demetrios John Zacharias, a native and citizen of Greece who was lawfully admitted for permanent residence in the United States in October, 1920, and to whom plaintiff was married January 5, 1925.

4. On or about June 11, 1936, and for sometime prior thereto, plaintiff and her husband were the owners of residential property with the address 1835 8th Street, N.E., Canton, Ohio, they residing in one portion of the building and the remaining portion being rented by them to one Charley Stolich. There was but one street address,—but there were separate house entrances to the two portions of the building. The relationship of plaintiff and her husband to said Stolich and his private apartment was entirely that of landlords. Said Stolich in turn rented separate rooms to other tenants.

5. On June 11, 1936, a member of the Canton Police Department appeared on the premises and ordered plaintiff, in the absence of her husband and said Stolich, to take to police headquarters two female tenants in Stolich's apartment, to be registered as prostitutes. Plaintiff, having no prior knowledge of said tenants' actions, at first refused but later, and under protest, took them to said headquarters, where they so registered as prostitutes operating at the street address of the house so occupied. Thereupon, the local police compelled plaintiff

under threats of arrest also to register; which she finally did under protest.

6. On August 4, 1937, under authority of the defendants, their predecessors in office and subordinates, there was issued and served upon plaintiff a warrant of arrest on the statutory deportation charge: "managing a house of prostitution."

7. Thereafter, and over a period of thirteen years, defendants, their predecessors and subordinates, have conducted repeated hearings, rehearings, appeals and related proceedings, lodging many additional charges, withdrawing or dismissing the same or others,—but all, each and every charge resting upon the said enforced
3 police registration which was not supported by any direct evidence whatsoever; the defendants' only witnesses, who were the vice squad officers, denying any knowledge of plaintiff being a prostitute. Throughout the entire proceedings; plaintiff has denied all of the charges lodged against her.

8. On August 7, 1947, the Board of Immigration Appeals, operating under the jurisdiction of the defendants and their predecessors, issued a formal ruling that plaintiff, in the proceedings theretofore, had been "denied certain rights of due process," invalidated all prior proceedings, ordered the outstanding order and warrant of deportation withdrawn, and the proceedings conducted *de novo*.

9. Thereafter, and without the issuance or service of any new warrant of arrest specifying the charges, the plaintiff again was subjected to a new series of hearings in which charges not theretofore asserted were lodged orally and later abandoned, but all charges resting upon the single incident of police registration referred to above. The said hearings were conducted by a Presiding Inspector and two Immigration Inspectors, acting as a

board of three who acted in the capacity of prosecutors, lodged additional charges, evaluated evidence, and finally on March 16, 1949, over the signature of the Presiding Inspector, made the following as conclusions of law:

(1) That the alien is deportable on the statutory ground of "managing a house of prostitution, or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes or where prostitutes gathered"; but

(2) That the alien was not deportable on the statutory grounds of "being an inmate of a house of prostitution" or "assisting a prostitute," or "being connected with the management of a house of prostitution."

10. On October 11, 1949, the Commissioner issued his ruling, including findings of fact and conclusions of law, holding that the plaintiff is subject to deportation in that (a) she has been found managing a house of
4 prostitution, and (b) she has been found to be an inmate of a house of prostitution; but that the plaintiff is not subject to deportation in that (a) she has been found assisting in prostitution, and (b) connected with the management of a house of prostitution. Based thereupon and on the same date, the Commissioner ordered that the plaintiff be deported "on the charge contained in the warrant of arrest and the following additional charge: The Act of 1917, in that she was an inmate of a house of prostitution." On the same date, October 11, 1949, the warrant of deportation was issued on statutory grounds neither contained in the warrant of arrest nor as ordered by the said Commissioner on the same date, but on the separate statutory grounds "managing a music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes or where prostitutes gather; and the Act of February 5, 1917 in that she has been found practicing prostitution after her entry;" the latter separate statutory charge never having

been lodged nor recommended by the Presiding Inspector nor approved by the Commissioner.

11. Formal appeal was taken to the Board of Immigration Appeals under the procedure in such cases provided and on the grounds that: (a) There was no substantial, direct, or positive evidence to support either of the two statutory charges finally specified in the warrant of deportation; and that (b) The conduct of the entire proceedings had been so confused, unwarranted, and unfair as to constitute a denial of due process of law.

12. On March 21, 1950, said Board of Immigration Appeals rendered a decision again ordering the case remanded for proceedings de novo, this time on the ground that such action was required by the decision of the U. S. Supreme Court in *Sung v. McGrath*, 70 S.Ct. 445. Thereupon, motion for reconsideration and revocation of such decision, and for cancellation of the order and warrant of deportation was filed by the plaintiff.

5 13. On July 5, 1950, the said Board of Immigration Appeals rendered its decision (a) withdrawing its decision dated March 21, 1950, and (b) dismissing the alien's appeal from the decision and order of the Commissioner dated October 11, 1949, which ordered deportation on the charge contained in the warrant of arrest (managing a house of prostitution) and the additional charge of being an "inmate of a house of prostitution."

14. Plaintiff is not now in custody, but is under bond for appearance when called by the defendants. Unless granted the relief herein prayed she is liable to be taken into custody and deported contrary to the Constitution of the United States and the laws in such case made and provided.

WHEREFORE, plaintiff prays:

A. For a declaratory judgment that plaintiff is not subject to deportation, in that:

1. Conduct of the entire proceedings has been so unfair, arbitrary, capricious, confused, and unwarranted as to constitute a denial of due process of law;

2. The formal decision of the Board of Immigration Appeals, dated August 7, 1947, holding that there had been a denial of due process, which decision the same Board on March 21, 1950 ruled had invalidated all prior proceedings, invalidated the original warrant of arrest and all proceedings based thereon prior to the Board's decision on August 7, 1947; and that no warrant of arrest containing charges having been issued or served subsequent to August 7, 1947, all subsequent proceedings were invalid and of no effect;

3. All proceedings prior to August 7, 1947 having been held invalid by the Board of Immigration Appeals, any proceedings against the plaintiff thereafter which would not conform to the Administrative Procedure Act of June 11, 1946 were invalid and of no effect because of a denial of due process of law; and

4. Alternatively, the record in the case fails to show any substantial, direct, or positive evidence to support the charges or grounds stated in the warrant of deportation.

B. For an injunction, enjoining and restraining the defendants and all persons acting under their authority or supervision, from further proceedings to effect the deportation of plaintiff on the charges or grounds stated in the orders and warrant of deportation or lodged in the said proceedings; and

C. For a mandate, directing the defendants and all persons acting under their authority or supervision, to

withdraw and cancel all outstanding orders and warrants of arrest and deportation; and release the plaintiff from all further appearance requirements or bond; and

D. For such other and further relief as to the Court may appear proper.

/s/ Warren W. Grimes
Warren W. Grimes
640 Shoreham Building
Washington 5, D. C.
Attorney for Plaintiff

7 Filed Nov 21 1950 Harry M. Hull, Clerk

Answer

First Defense

The complaint fails to state a cause of action upon which relief may be granted.

Second Defense

The court lacks jurisdiction over the subject matter of the complaint.

Third Defense

Specifically answering the numbered paragraphs of the complaint, defendants admit, deny, and aver as follows:

1. Paragraph one of the complaint states a conclusion of law which defendants are not required to admit or deny; insofar as an answer may be required the allegations are denied.

2. Admitted.

3. Defendants admit that plaintiff entered the United States at the port of New York, N. Y., on June 22, 1913, for permanent residence, has remained continuously with-

in this country since that time and presently resides in Masillon, Ohio. Defendants further admit that plaintiff is married to Demetrios John Zacharias, a native of Greece, who first entered the United States in October, 1920. Defendants further admit that plaintiff is a native of Great Britain. Defendants lack sufficient information to form a belief as to the truth or falsity of the date of plaintiff's marriage.

4. Defendants admit that on or about June 11, 1936, plaintiff and her husband were residing at 1835 8th Street, N. E., Canton, Ohio. Defendants lack sufficient information to form a belief as to the truth or falsity of the allegation in regard to the ownership of the property. The remaining allegations of paragraph 4, of the complaint are denied.

5. Defendants admit that on or about June 11, 1936, plaintiff and another person or persons were registered as prostitutes by the Canton Police. The remaining allegations of paragraph 5, are denied.

6. Admitted.

7. Defendants admit that a hearing for plaintiff's deportation was commenced in 1937, and concluded in 1938. Defendants further admit that at plaintiff's request the proceeding was reopened in 1947. Defendants admit that while the form of some of the charges has been changed, all changes have been in connection with that stated in the original arrest warrant. The remaining allegations of paragraph 7, are denied.

8. Admitted.

9. Defendants deny that the hearings were conducted by a presiding inspector and two immigration inspectors acting as a board of three in the capacity of prosecutors. The remaining allegations of paragraph 9, are admitted.

10. It is admitted that the warrant of deportation issued October 11, 1949, did through a clerical error contain one ground of deportation not included in the warrant of arrest nor as ordered by the commissioner, but defendants aver that as this warrant has not been executed, it is subject to correction and will be corrected. The remaining allegations of paragraph 10, are admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Defendants deny that plaintiff is liable to be taken into custody and deported contrary to the constitution and laws of the United States. The remaining allegations of paragraph 14, are admitted.

WHEREFORE defendants demand that the complaint be dismissed with costs.

/s/ George Morris Fay
GEORGE MORRIS FAY
United States Attorney

/s/ Ross O'Donoghue
ROSS O'DONOGHUE
Assistant United States
Attorney

/s/ L. Clark Ewing
L. CLARK EWING
Assistant United States
Attorney

10 Filed Feb 18 1952 Harry M. Hull, Clerk
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Anna Zaharias, Plaintiff.

vs.

J. Howard McGrath and Argyle Mackey, Defendants.

Civil Action No. 3087-50

PRETRIAL PROCEEDINGS

• • • •

11 *Pretrial Order*

Plaintiff is a native and citizen of Great Britain. She entered the United States and was lawfully admitted for permanent residence in 1913. She has remained continuously in the country since that date. She married Demetrios John Zacharias, a native and citizen of Greece, and resides with him at Massillon, Ohio. On August 4, 1937, she was served with a warrant for the arrest of an alien and as a result of said warrant deportation proceedings were held. The original decision to deport her as a result of these hearings was reversed by the Board of Immigration Appeals on August 7, 1947. A new series of hearings were held, finally resulting in an order of the Board of Immigration Appeals on July 5, 1950, which determined plaintiff to be deportable for grounds stated therein. This is an action for a declaratory judgment, asking that the Court review the proceedings and to issue an injunction restraining the defendants from further proceedings toward the deportation of the plaintiff and for a mandate directing the defendants to withdraw and cancel all outstanding orders and warrants of deportation and to release plaintiff from all further restraint or

further appearance requirements on bond. Plaintiff makes the following contentions:

1. The conduct of the entire proceedings has been so unfair, arbitrary, capricious, confused, and unwarranted as to constitute a denial of due process of law;

12 2. The formal decision of the Board of Immigration Appeals dated August 7, 1947, holding that there had been a denial of due process of law and remanding the case for proceedings de novo, which decision the same Board on March 21, 1950, ruled had invalidated all prior proceedings, invalidated the warrant of arrest as well as all proceedings prior to August 7, 1947; the issuance and service of the warrant of arrest being a necessary part of such proceedings"; and, no valid warrant of arrest containing charges having been issued or served subsequent thereto, all subsequent proceedings were invalid and of no effect.

3. Since all proceedings prior to August 7, 1947 were formally invalidated by the Board of Immigration Appeals and the case was remanded for "proceedings" de novo, the provisions of the Administrative Procedure Act of June 11, 1946 were not followed and there was a denial of due process of law in failure to proceed "de novo" as ordered; and

4. The record in the case fails to show any direct, positive or substantial evidence to support the specific statutory charges stated in the warrants of deportation.

Defendants deny:

1. That the conduct of the proceedings has been so unfair, arbitrary, capricious, confused and unwarranted as to constitute a denial of due process of law.

2. That while the decision of the Board of Immigration Appeals dated August 7, 1947, ordered proceedings de novo and canceled the outstanding warrant of depor-

tation that it did not invalidate the warrant of arrest and thus did not invalidate any subsequent proceedings under that original warrant of arrest.

3. That the Administrative Procedure Act applied to this case in any way, on the ground that the proceedings commenced before the effective date of the Administrative Procedure Act.

4. That there was a lack of substantial positive evidence to support the charges in the warrants of deportation.

Stipulation

The entire record of the Immigration and Naturalization Service, so far as it was pertinent to the decisions of the Board of Immigration and Naturalization Appeals, will be submitted by defendants for review by the Court. It is stipulated and agreed between the parties, subject to an objection as to relevancy materiality, that said record may be introduced in evidence without formal proof. It is further stipulated between counsel that the record of the Board of Immigration and Naturalization Appeals so submitted is a complete record so far as concerns this proceeding.

/s/ Charles F. McLaughlin
CHARLES F. McLAUGHLIN
Pretrial Judge

14 Filed Mar 25 1952 Harry M. Hull, Clerk

Motion for Summary Judgment

Come now the defendants by their attorney, the United States Attorney, and move this Court for a summary judgment for the reason that there is no genuine issue of

material fact and defendants are entitled to judgment as a matter of law.

/s/ Charles M. Irelan
CHARLES M. IRELAN
United States Attorney

/s/ Ross O'Donoghue
ROSS O'DONOGHUE
Assistant United States Attorney

/s/ Raymond E. Baker
RAYMOND E. BAKER
Assistant United States Attorney

15 Filed May 5 1952 Harry M. Hull, Clerk

Plaintiff's Counter Motion for Summary Judgment

Comes now the plaintiff by her attorney, Warren W. Grimes, and moves this Court for a summary judgment in favor of the plaintiff.

The reasons for said motion are that pretrial order has been approved and under stipulation therein the record of the Board of Immigration Appeals has been submitted as the complete record, that no additional evidence will be introduced, and that final judgment may be pronounced based upon such record, the pleadings and memoranda of points and authorities; and that thereon the plaintiff is entitled to judgment as prayed in her complaint.

/s/ Warren W. Grimes
Warren W. Grimes
Attorney for Plaintiff

16 Filed May 12 1952 Harry M. Hull, Clerk

Memorandum of Court

This case is before the Court on final hearing, the case having been pretried and the parties having, in open Court, requested that the case be heard on the record, including the file in the immigration proceedings. The latter file has been filed in Court, and has been carefully reviewed.

The Court, upon consideration of that file and the other papers before it, has reluctantly concluded, for the reasons hereinafter stated, that the complaint must be dismissed. The Court cannot say that the conduct of the proceedings was so unfair, arbitrary or capricious as to constitute a denial of due process, and the Court believes that there was direct and positive evidence to support the statutory charges stated in the warrants of deportation.

The Court has stated that he has reached his conclusion reluctantly. The reason for that statement is that the plaintiff has been a resident of this country since 1913; the pertinent charges are about fifteen years old; she has no near or close relatives in the country to which she is to be deported and from which all ties seem to have been severed; and, apparently, her record in recent years has been very good. If the Court had power so to do, he would order a suspension of the order of deportation; but there seems to be no authority in the
17 Court to take such action, this being a part of the administrative procedure.

/s/ Walter M. Bastian
Judge

May 12, 1952

• • • •

18 Filed Aug 5 1952 Harry M. Hull, Clerk

Order

This cause having come on to be heard upon cross motions for summary judgment, and it appearing to the Court that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law, it is by the Court this 5th day of August, 1952,

ORDERED that defendants' motion for summary judgment be, and the same is hereby, granted and judgment is hereby entered for the defendants, and it is further ORDERED that plaintiff's motion for summary judgment be, and the same is hereby, denied.

Walter M. Bastian
Judge

19 Filed Aug 29 1952 Harry M. Hull, Clerk

Order

This cause having come on to be heard on the joint motion for substitution of parties defendant, and it appearing that substitution was necessary and both parties consenting thereto, it is, this 29th day of August, 1952,

ADJUDGED, ORDERED and DECREED that James P. McGranery, Attorney General of the United States, be substituted as a defendant in place of J. Howard McGrath, resigned.

/s/ Burnita Shelton Matthews
Judge

20 Filed Sep 4 1952 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this 4th day of September, 1952, that Anna Zaharias, plaintiff hereby appeals to the United

17 A

States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 5th day of August, 1952 in favor of the above-named defendants and against said plaintiff.

/s/ Warren W. Grimes
Warren W. Grimes,
Attorney for Plaintiff
640 Shoreham Bldg.

24 Filed Oct 6 1952 Harry M. Hull, Clerk

Order

Notice of appeal of the above-entitled cause to the United States Court of Appeals for the District of Columbia together with plaintiff's designation of the formal record both having been filed and served, and it appearing that the departmental file of the Commissioner of Immigration and Naturalization and of the Board of Immigration Appeals was submitted for review by this Court, it is by the Court this 6th day of October, 1952,

ORDERED, That in addition to the record as designated, and apart therefrom, the Clerk of this Court submit the said file to the United States Court of Appeals for the District of Columbia as an exhibit.

/s/ Walter M. Bastian

Judge

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11578

ANNA ZAHARIAS, APPELLANT

v.

JAMES P. McGRANERY AND ARGYLE MACKAY, APPELLEES

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

CHARLES M. IRELAN,

United States Attorney.

WILLIAM R. GLENDON,

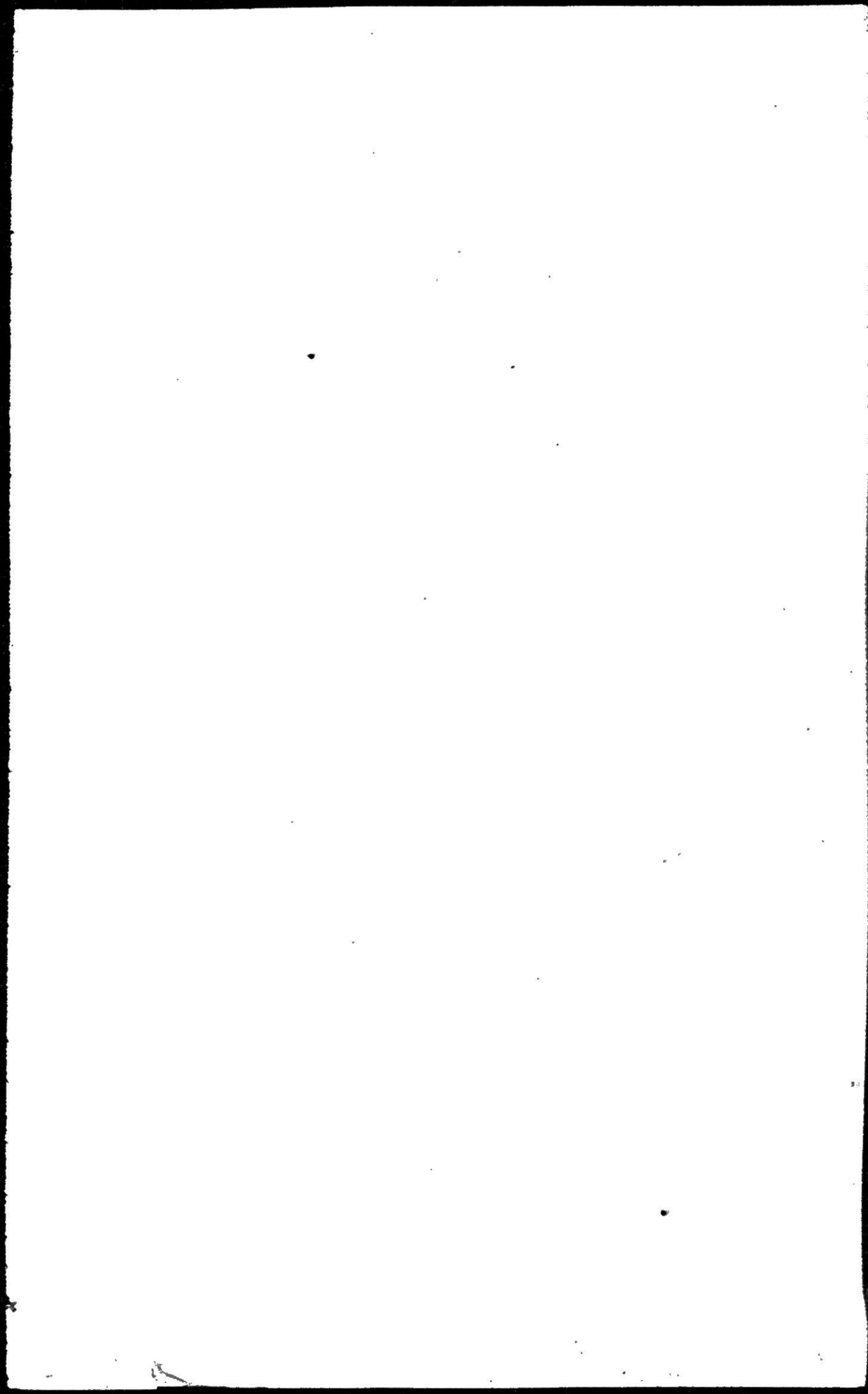
LEWIS A. CARROLL,

Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAR 27 1953

Foyel W. Stewart
CLERK



QUESTIONS PRESENTED

Appellant, a native and citizen of England who has been admitted to permanent residence in the United States, entered, on December 16, 1936, a plea of guilty to a charge of conspiracy to violate the Mann Act, Title 18, U. S. Code, § 88,398. On August 4, 1937, a warrant of arrest was issued against appellant on the ground that she had been found managing a house of prostitution. Thereafter, several administrative hearings were held and findings and orders entered which resulted, on July 5, 1950, in a finding that appellant was deportable on the ground stated in the warrant of arrest (managing a house of prostitution) and on the additional charge lodged against her at the hearing on September 23, 1937 (inmate of a house of prostitution). On July 18, 1950, appellant filed a complaint in the District Court for declaratory judgment, injunction and mandate. The Government filed a motion for summary judgment, which was granted, and appellee filed a countermotion, which was denied.

In the opinion of appellees, the following question is presented:

1. Can an alien, who makes no claim of citizenship and who is not claiming eligibility for citizenship, attack an outstanding order of deportation by any means other than habeas corpus?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11578

ANNA ZAHARIAS, APPELLANT

v.

JAMES P. McGRANERY AND ARGYLE MACKEY, APPELLEES

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

Appellant, a native and citizen of England who has been admitted to permanent residence in the United States and who is married to a native and citizen of Greece, who also has been admitted to permanent residence in this country, is bringing this appeal from an order of the District Court which granted a motion for summary judgment in favor of appellees and denied her countermotion for summary judgment. On November 19, 1937, in the District Court of the United States for the Northern District of West Virginia a five-count indictment was returned against Charley Stolich, Jimmy Zaharias, and appellant for violation of, and conspiracy to violate the Mann Act. Title 18, U. S. Code, §§ 88, 398. Appellant entered a plea of guilty to the charges and, on December 17, 1936, was sentenced to serve a year and a day in the Federal Industrial Institution for Women at Alderson, West Virginia, (Immigration File, Exhibit No. 4, received March 31, 1937).¹

¹The indictment reads, in pertinent part, as follows (Exhibit No. 4, Immigration File, received March 31, 1937):

'Overt Act No. 1 reads in part as follows: * * * That on or about the

A. Administrative proceedings

On August 4, 1937, a warrant for appellant's arrest was issued on the following ground (Imm. file, Warrant of Arrest, August 4, 1937):

The immigration act of 1917, in that she has been found managing a house of prostitution or music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather.

An immigration hearing was initiated on August 23, 1937, at Federal Industrial Institution for Women at Alderson, West Virginia, and continued "in order to enable appellant to arrange for the services of an attorney" (Imm. File, Report of Hearing, August 23, 1937). On September 23, 1937, the hearing was resumed at Alderson, West Virginia, where appellant was represented by counsel.² After hearing the testimony, the

14th day of January 1936, the said defendants Charles Stolich * * * and Jimmy Zaharias * * * left Canton, in the State of Ohio, in an automobile owned by the defendant Jimmy Zaharias * * * and drove the same to Weirton, in the State of West Virginia, for the purpose of contacting one Edith Yost, in order to induce and persuade her * * * to travel with them * * * to Canton * * * and there to engage in commercialized prostitution, at the disorderly house operated by the defendant Anna Zaharias.'

"Over Act No. 3 reads in part as follows: '* * * That on or about the 14th day of January 1936, the said defendants Charley Stolich * * * and Jimmy Zaharias * * * transported said Edith Yost, from Weirton * * * to Canton * * * for the purpose of placing said Edith Yost in the house of prostitution operated by the defendant Anna Zaharias, where said Edith Yost was to engage in commercialized prostitution for the benefit and profit of the said Anna Zaharias and others.'

"Overt Act No. 4 reads in part as follows: 'That after the above transportation had been made * * * said Anna Zaharias being advised and knowing that the said Edith Yost had been transported from * * * Weirton to Canton * * * for the purpose of commercialized prostitution, took said Edith Yost into her house of prostitution operated by her in * * * Canton, and kept said Edith Yost in her said house of prostitution and caused the said Edith Yost to prostitute herself there for profit and reward, and for the profit and benefit of said defendant Anna Zaharias and other persons to the Grand Jurors unknown.'

"Overt Act No. 5 reads 'That the said defendant Anna Zaharias, caused said Edith Yost to register in said house of prostitution operated by her in said City of Canton, * * * in the name of Louise Bevis, for the purpose of concealing the true identity of Edith Yost while she was so serving the said defendant Anna Zaharias as a prostitute.' [Emphasis added.]

² Appellant stated that her husband had jumped bond and was in Greece. She admitted knowing Louise Bevis and Tillie Ferris, that they lived in

examining officer lodged an additional charge covered by the code word "Inmate," in that appellant was found to be an inmate of a house of prostitution (Imm. File, *ibid.*, at pages 11-12) and continued the hearing at appellant's request to enable her to obtain witnesses.

On October 6, 1937, appellant was released from incarceration at Alderson, West Virginia, and she was placed on \$1,000.00 immigration delivery bond. On November 23, 1937, the hearing was resumed at Columbus, Ohio, where another attorney represented appellant and submitted the case on the record made at Alderson, West Virginia (Imm. File, Report of Hearing, November 23, 1937). The examining officer subsequently made written findings that appellant was subject to deportation on both the warrant charge (found managing a house of prostitution) and the lodged charge (an inmate of a house of prostitution),³ and, on June 13, 1938, the Chairman of the Board of Review issued a written opinion sustaining the findings of the examining officer on both charges and recommended that appellant be deported to England (Imm. File, June 13, 1938). A warrant for deportation was issued against appellant on July 12, 1938, on the following grounds: "The act of 1917, in that she has been found managing a house of prostitution; and that she is an inmate of a house of prostitution" (Imm. File, July 12, 1938).

Appellant, who was at liberty under bond, moved to reopen the proceedings on March 14, 1947, and, on July 14, 1947, the Acting Commissioner of Immigration recommended that such

her house, that they were prostitutes and that she knew that prostitution was practiced at her house (Imm. File, Report of Hearing, September 23, 1937, at pages 5, 6, 7, 8, 11). She also stated: "Q—Was that a house of prostitution? A—Yes" (Imm. File, *ibid.*, at page 6).

Appellant testified that she accompanied Bevis and Ferris to the Police Headquarters at Canton, Ohio, where they were registered and photographed as prostitutes on June 11, 1937, and that she was photographed on November 20, 1937, when she was arrested for the federal authorities (Imm. File, *ibid.*, at pages 9-11).

³ The accompanying papers and exhibits include:

Passport data sheet; Exhibit A—Copy of arrest warrant;

Exhibit B—Report of Investigation;

Exhibit C—Certificate of Admission;

Exhibit D—Photostatic copy of picture and description of appellant, signed

motion be granted in order that appellant be confronted by the witnesses who testified against her and to permit her to cross-examine them (citing 8 C. F. R. 150.6 (i)) (Imm. File, July 14, 1947).⁴ On August 7, 1947, the Board of Immigration Appeals, after holding that it appeared that appellant had been denied certain rights of due process even though 8 C. F. R. 150.6 (i) had not been in effect at the date of the hearing, ordered (Imm. File, August 7, 1947):

The outstanding order and warrant of deportation are withdrawn, and the case reopened for proceedings *de novo* * * *.

On January 29, 1948, a hearing *de novo* was commenced at Canton, Ohio, and, after considerable testimony was taken, it was adjourned until further notice on request of appellant to enable her to obtain additional witnesses (Imm. File, January 29, 1948, pp. 1-30).⁵ However, during such first session of the

by her, and showing her occupation as "prostitute" and her previous record as "9-20-26 Run House Pros. 20 da. W. H."

Exhibit E—Photostatic picture and description of Louise Bevis, showing her occupation as "Pros."

Exhibit F—Photostatic picture and description of Tille Ferris, showing her occupation as "Pros."

Exhibit G—Report of Investigation, dated May 27, 1937, re criminal record of appellant. (Includes the following entry: Arrested July 15, 1928, for violation of Crabbe Act for running a house of ill fame. The investigator reports that no record of conviction was found.)

Exhibit H—(a) Report of Investigation, dated June 25, 1937, re appellant's connection with commercialized prostitution in Canton, Ohio; (b) Sworn statement of police officer George Halley, dated, June 18, 1937; (c) Sworn statement of police officer Norman Lloyd dated June 18, 1937.

Exhibit I—Certified letter of police officer W. F. Grether, dated July 22, 1937, re registration of Ferris and Bevis.

Exhibit J—Sworn statement of police officer William F. Grether, including the statement: "A—Our fingerprint records indicate that on September 20, 1936, she was arrested and convicted of operating a house of prostitution, and that she served twenty days in the Canton Workhouse on that charge. * * *" (Appellant admitted this connection, see Imm. File, Report of Hearing, September 23, 1937, at page 8.)

⁴ See Exhibit H in fn. 3, *supra*.

⁵ Police officer Robert Norman Lloyd (pp. 3-6); police officer William F. Grether (pp. 24-28) and appellant (pp. 6-24) testified at this time, and the following exhibits were introduced into evidence:

Exhibit 1—Warrant of arrest, dated August 4, 1937;

Exhibit 2—Certificate of admission;

Exhibit 3—Report of Investigation, dated May 27, 1937;

Exhibit 4—Certified copy of Indictment, Judgment and Sentence in

hearing *de novo*, two additional charges were lodged against appellant, namely (Imm. File, *ibid.*, p. 13):

* * * That you are in the United States in violation of: The Act of February 5, 1917, in that you were an inmate of a house of prostitution; and the Act of February 5, 1917, in that you had been found assisting a prostitute * * *.

The hearing was resumed on February 10, 1949, at Canton, Ohio, where the taking of testimony was completed (Imm. File, February 10, 1949, pp. 31-83).⁶ On March 16, 1949, the

United States District Court in and for the Northern District of West Virginia;

Exhibit 5—Report of the F. B. I., dated March 5, 1948;

Exhibit 6—Sworn statement of police officer William F. Grether, dated July 23, 1937;

Exhibit 7—Affidavit of Charles R. Steffic, dated January 27, 1948;

Exhibit 8—Affidavit of Nick Orphan, dated January 27, 1948;

Exhibit 9—Report of Clerk of Massillon Municipal Court, dated January 21, 1948.

⁶ Police officer Ernest W. Smith (pp. 32-39); James E. Kirby (pp. 40-50); police officer Robert N. Lloyd (pp. 62-69); police officer William F. Grether (pp. 69-74) appeared and testified as government witnesses. Helen Ann Spehar (pp. 50-52); Leonarda Lega (pp. 52-56); Earl E. Tschanty (pp. 56-59); and Clifford Williams, Jr. (pp. 59-62) appeared and testified on behalf of appellant, who also testified (pp. 74-83). (It is to be noted that none of appellant's witnesses testified as to her relationship to prostitution in Canton, Ohio.) In addition, the following exhibits were introduced into evidence:

Exhibit 10—Report of Investigation, dated April 26, 1948;

Exhibit 11—Sworn statement of Norman Lloyd, dated June 18, 1937;

Exhibit 12—Photostatic copy of photograph and description of Tillie Ferris, listing her occupation as "Pros.";

Exhibit 13—Photostatic copy of photograph and description of Louise Bevis, listing her occupation as "Pros.";

Exhibit 14—Photostatic copy of photograph and description of appellant, listing her occupation as "prostitute";

Exhibit 15—Certified report of W. F. Grether, dated July 22, 1937;

Exhibit 16—Report of Investigation, dated June 9, 1948;

Exhibit 17—(Noted as "death certificate of Harold Baldwin, first husband of Anna Zaharias, has not as yet been received.");

Exhibit 18—(Noted as: "* * * General Information Form I-55 to be submitted by Anna Zaharias, has not as yet been received.");

Exhibit 19—Record of arrests of appellant submitted by Chief of Police of Canton, Ohio, dated January 14, 1949, showing four arrests, one conviction;

Exhibit 20—Report of arrests of appellant submitted by Clerk of Municipi-

presiding inspector issued a written opinion in which it was found that appellant was deportable on the charge contained in the warrant of arrest, namely, "that she has been found managing a house of prostitution or music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather" (Imm. File, Opinion of Presiding Inspector, dated March 16, 1949, pp. 1-13 at p. 13).⁷ The presiding inspector found, however, that the three lodged charges⁸ could not be sustained.⁹ It was also recommended that appellant's application for suspension of deportation be denied. On October 11, 1949, the Chief Examiner of the Immigration and Naturalization Service, in an opinion concurred in by the Assistant Commission of the Adjudication Division, found that the charge in the warrant of arrest (managing a house of prostitution) and charge first lodged against appellant (inmate of a house of prostitution) were sustained (Imm. File, Application: Suspension of depor-

pal Court of Massillon, Ohio, dated January 31, 1949, showing no arrests;

Exhibit 21—(Noted as: "police clearance letter from the Bridgeport, Connecticut * * * has not as yet been received.").

⁷ The opinion reads, in pertinent part, as follows: "It is the opinion of the writer that the evidence clearly connects the respondent with the management of a house of prostitution and it is found that the charge in the warrant of arrest is amply supported. It is also found that her imprisonment at the Federal Industrial Institution for Women was directly the result of her misconduct in relation to prostitution; the identical misconduct which forms the basis for the charge in the warrant of arrest. In view of this fact and in the light of the Board of Immigration Appeals holding in Matter of Jez, Dec. 26, 1946, it is concluded that service of the warrant of arrest in the instant proceedings was affected at a time reasonably contemporaneous with the misconduct upon which said warrant was based" (Imm. File, *ibid.*, p. 6).

⁸ These charges consist of: "The Act of February 5, 1917, in that she is an inmate of a house of prostitution; The Act of February 5, 1917, in that she has been found *assisting a prostitute*; and The Act of February 5, 1917, in that she has been found *connected with the management of house of prostitution*." [Emphasis supplied.] (Imm. File, *ibid.*, p. 1.)

⁹ The opinion reads in pertinent part as follows: "All three of these charges are based upon misconduct of the petitioner in 1936, which has been discussed. It is immediately apparent, then, that the charges were lodged over ten years after the apparent termination of the respondent's connection with prostitution. In view of that fact, it is concluded that said charges were not lodged at a time reasonably proximate to the misconduct in question and it is concluded that they are not sustained." (Imm. File, *ibid.*, p. 6.)

tation, dated October 11, 1949, pp. 1-6). He found that the inmate charge was sustained because it had originally been lodged on September 23, 1937, at the hearing at Alderson, West Virginia, and thus was not too remote from the time of the misconduct (Imm. File, *ibid.*, pp. 3-4, 6).¹⁰ As to the other two charges (assisting a prostitute, and connection with management), the Chief Examiner agreed with the opinion of the presiding officer that they could not be sustained (Imm. File, *ibid.*, p. 4). Hence, it was found that appellant was ineligible for discretionary relief and it was recommended that she be deported to England (Imm. File, *ibid.*, p. 5-6).

On October 11, 1949, a warrant of deportation was issued against appellant on the basis of the above-mentioned findings. However, through clerical error, such warrant listed the grounds of deportation as the findings that she had managed a house of prostitution, and had practiced prostitution, after her entry (Imm. File, Warrant of Deportation, dated October 11, 1949). Then, on November 7, 1949, a notice of appeal was filed, upon which oral argument was conducted on December 13, 1949.¹¹

The Board of Immigration Appeals, on March 21, 1950, remanded the case for a hearing *de novo* on the basis of the decision of the United States Supreme Court in *Sung v. McGrath*, decided February 20, 1950 (Imm. File, Application for Cancellation of Warrant, March 21, 1950).¹² Appellant, on March 24, 1950, moved the Board to reconsider its order remanding the case for a hearing *de novo* and made a request for oral argument, which request was granted (Imm. File, March 31, 1950); and, on April 13, 1950, oral argument was held on the Motion.

On July 5, 1950, the Board of Immigration Appeals granted appellant's motion for reconsideration and revocation, and it reversed its order of March 21, 1950, affirmed the decision of

¹⁰ See also: Imm. File, Report of Hearing, September 23, 1937, *supra*; at p. 11.

¹¹ Appellants present counsel represented her at the oral argument on the appeal.

¹² See: *Sung v. McGrath* (1950) 339 U. S. 33, wherein it was held that the procedural requirements of the Administrative Procedure Act applied to deportation proceedings (5 U. S. C. § 1001 *et seq.*).

the Commissioner of October 11, 1949, and dismissed the appeal (Imm. File, Application for Cancellation of Proceedings, July 5, 1950). The decision of the Board was based on the fact that the proceedings had commenced prior to the effective date of the Administrative Procedure Act,¹³ and appellant was held to be deportable on the charge stated in the warrant of arrest (managing a house of prostitution), and on the charge lodged against her at the hearing on September 23, 1937 (inmate of a house of prostitution) (Imm. File, *ibid.*, p. 5).¹⁴ On December 7, 1950, a new warrant of deportation was issued against appellant which corrected the clerical error in the warrant dated October 11, 1949, and which lists the grounds of deportation as the finding that appellant managed a house of prostitution and was an inmate of a house of prostitution.

B. Judicial proceedings

On July 18, 1950, appellant filed a complaint for declaratory judgment, injunction and mandate (J. A. 2A-8A). It was alleged therein that appellant is a native and citizen of Great Britain and that she entered the United States on June 22, 1913, and was admitted for permanent residence; that she married Demetrios John Zaharias, a native and citizen of Greece, who had been admitted for permanent residence in this country, on January 5, 1925. It was also alleged that, on or about June 11, 1937, and some time prior thereto, appellant and her husband owned certain residential property located at 1835 8th

¹³ In support of its position, the Board of Immigration Appeals cited *Harisiades v. Shaughnessy*, decided April 4, 1950, by the United States District Court for the Southern District of New York, 90 F. Supp. 431. This decision was affirmed by the Circuit Court of Appeals for the Second Circuit on February 6, 1951 (187 F. 2d 137) and, on March 10, 1952, by the Supreme Court (342 U. S. 580).

¹⁴ The opinion reads, in pertinent part, as follows (Imm. File, *ibid.*, p. 5):
 “* * * In view of the decision rendered in the *Matter of Jez*, A-5006378 (December 17, 1948), we find that the misconduct which forms the basis for the charge stated in the warrant of arrest issued on August 4, 1937, and served on the respondent on August 23, 1937, and the misconduct which forms the basis for the charge lodged during the original hearing conducted on September 23, 1937, were reasonably contemporaneous with her arrest in deportation proceedings. Accordingly, the appeal will be dismissed. * * *

Street NE., in Canton, Ohio, and that one Charley Stolich¹⁵ rented a portion of such building; that, on June 11, 1936, a member of the Canton Police Department compelled appellant, who had no prior knowledge of the facts, to take two female tenants of Stolich to the police headquarters and register them as prostitutes and that appellant, under protest, also registered as a prostitute (J. A. 3A-4A); that, on August 4, 1937, a warrant of arrest on the statutory charge of "managing a house of prostitution" was issued against appellant (J. A. 4A). It was further alleged that appellant has been subjected to repeated administrative hearings which ultimately, on July 5, 1950, resulted in an order of deportation being issued against her (J. A. 4A-6A).¹⁶

Appellees filed an answer to the complaint on November 21, 1950 (J. A. 8A-10A), and the case came on for pre-trial proceedings (J. A. 11A-13A). The pre-trial order contains the contentions of appellant and the denials of appellees, together with the stipulation that the entire record of the Immigration and Naturalization Service would constitute the complete record in the instant case (J. A. 13A). Thereupon, on March 25, 1952, appellees filed a motion for summary judgment, together with a memorandum of points and authorities (J. A. 13A), to which appellant filed an opposition. Then, on May 5, 1952, appellant filed a counter-motion for summary judgment (J. A. 14A). The lower court filed a memorandum opinion on May 12, 1952, which reads, in pertinent part, as follows (J. A. 15A):

The Court, upon consideration of that file and the other papers before it, has reluctantly concluded, for the reasons hereinafter stated, that the complaint must be dismissed. The Court cannot say that the conduct of the proceedings was so unfair, arbitrary or capricious as to constitute a denial of due process, and the Court

¹⁵ Charles Stolich, alias "Airplane Charley," was also indicted with appellant on charges of violating the Mann Act (Imm. File, Exhibit 4). See note 1, *supra*.

¹⁶ Appellant referred in the complaint, only to the August 4, 1947, ruling of the Board of Immigration Appeals; the conclusion of law of the Presiding Inspector, dated March 16, 1949; the ruling of the Commission, dated October 11, 1949; the decision of the Board of Immigration Appeals, dated March 21, 1950; and the order, dated July 5, 1950 (J. A. 4A-6A).

believes that there was direct and positive evidence to support the statutory charge stated in the warrants of deportation.

On August 5, 1952, the lower court granted appellee's motion for summary judgment and denied appellant's countermotion (J. A. 16). From such order of the Court, appellant, who is presently at liberty under bond, now brings this appeal (J. A. 16A-17A).

STATUTES INVOLVED

The Immigration Act of 1917, Title 8, United States Code, Section 155, provided in part as follows:

Deportation of undesirable aliens generally (a)
 * * * any alien who shall be found an inmate or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import or shall attempt to import any person for purposes of prostitution or for any immoral purpose; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * The provisions of this section, with the exceptions herein before noted, shall be applicable to the classes of aliens mentioned irrespective of the time of their entry into the United States; * * *.

The Administrative Procedure Act (Title 5, United States Code, Section 1011) provides, in part, as follows:

* * * This chapter shall take effect three months after its approval except that sections 1006 and 1007 of this title shall take effect six months after such approval, the requirement of the selection of examiners

pursuant to section 1010 of this title shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceedings initiated prior to the effective date of such requirement.

SUMMARY OF ARGUMENT

The recent decision of the Supreme Court in *Heikkila v. Barber*, — U. S. —, 21 U. S. Law Week 4249 (decided March 16, 1953), is decisive of the issues in the instant case. In the *Heikkila* case, it was held that an alien whose status as such is undisputed can only attack an outstanding order deportation by habeas corpus. Hence, the lower court was correct in dismissing appellant's complaint for declaratory and injunctive relief.

Even if it is assumed, *arguendo*, that habeas corpus were not the sole method of attacking an outstanding order of deportation, it is clear that the lower court was correct in dismissing the complaint. The instant immigration proceedings were initiated before the effective date of the Administrative Procedure Act, hence such Act does not apply in the instant case. Furthermore, the record, which is free from procedural errors, shows that the charges against appellant are supported by direct and positive evidence.

ARGUMENT

I

The lower court was correct in dismissing the complaint for declaratory and injunctive relief against an outstanding order of deportation because such orders can only be attacked by habeas corpus

Appellant has based his complaint on the Declaratory Judgment Act, approved June 14, 1934, as amended (28 U. S. Court of Appeals, Section 400); and the Administrative Procedure Act, approved June 11, 1946, and particularly sections 9 (a) and 10 thereof (5 U. S. C. A. Sections 1008 (a), 1009) (J. A. 2A). That the lower court was correct in dismissing the complaint

is shown by a review of the pertinent statutory provisions and applicable judicial decisions.

It is now settled that appellant can attack the deportation order issued against her only by petitioning for a writ of *habeas corpus*. In the Supreme Court's decision in *Heikkila v. Barber*, — U. S. —, 21 U. S. Law Week 4249, decided March 16, 1953, there an alien ordered deported attacked the validity of the deportation order. Jurisdiction was predicated primarily on Section 10 of the Administrative Procedure Act, 5 U. S. C. A. Section 10.9. The Supreme Court held that there was no jurisdiction under Section 10 of the Administrative Procedure Act to review deportation orders and the exclusive remedy was by *habeas corpus*. In so doing, it held that where Section 10 of the Act provides for judicial review of agency action "Except so far as (1) statutes preclude judicial review * * *" that the proviso of Section 19 (a) of the Immigration Act of 1917, 5 U. S. C. A., Section 155 (a), providing "In every case where any person is ordered deported from the United States under the provisions of this Act or any law or treaty, the decision of the Attorney General shall be final" was such a statute precluding judicial review within the meaning of the above-quoted exception to Section 10 of the Administrative Procedure Act.

Thus, after reviewing the judicial decisions interpreting the finality of the Executive Officer's determinations under the various immigration laws, the Court stated:

Read against this background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act, 39 Stat. 890 clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution. And the decisions have continued to regard this point as settled. *Kessler v. Strecker*, 307 U. S. 22, 34 (1939); *Bridges v. Wixon*, 326 U. S. 135, 149, 166, 167 (1945); *Estep v. United States*, 327 U. S. 114, 122, 123, n. 14 (1946); *Sunal v. Large*, 332 U. S. 174, 177, n. 3 (1947). Clearer evidence that for present purposes the Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine. Whatever view be taken as

to the breadth of § 10 of the Administrative Procedure Act, the first exception to that section applies to the case before us. The result is that appellant's rights were not enlarged by that Act. Now, as before, he may attack a deportation order only by habeas corpus.

After indicating its disagreement with three Court of Appeals decisions taking contrary positions, the Court stated:

In short, it is the scope of inquiry on habeas corpus that differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act. We hold that deportation orders remain immune to direct attack.

The Court then went on to distinguish review of deportation orders from such cases as *Perkins v. Elg*, 307 U. S. 325 (1939) and *McGrath v. Kristensen*, 340 U. S. 162 (1950). The Court pointed out that in those cases a declaration of status was sought and neither involved review of an outstanding deportation order. The Court then concluded:

Appellant's Administrative Procedure Act argument is his strongest one. The reasons which take his case out of § 10 apply *a fortiori* to arguments based on the general equity powers of the federal courts and the Declaratory Judgments Act. 28 U. S. C. § 2201. See *Skelly Oil Co. v. Phillips Co.*, 339 U. S. 667, 671-672 (1950). Because we decide the judgment below must be affirmed on this procedural ground, we do not reach the other questions briefed and argued by the parties.

The rule which we reaffirm recognizes the legislative power to prescribe applicable procedures for those who would contest deportation orders. Congress may well have thought that habeas corpus, despite its apparent inconvenience to the alien, should be the exclusive remedy in these cases in order to minimize opportunities for repetitious litigation and consequent delays as well as to avoid possible venue difficulties connected with any other type of action. We are advised that the Government has recommended legislation which would permit

what Heikkila has tried here. But the choice is not ours.

It is readily apparent that the lower court acted properly in dismissing the complaint. Appellant's status as an alien is not disputed and the relief she wants is against an outstanding deportation order. Under the decision in the *Heikkila* case, *supra*, the proper action is habeas corpus, and not for declaratory and injunctive relief.

II

Even if it is assumed, *arguendo*, that habeas corpus were not the sole method of attacking an outstanding order of deportation, the Administrative Procedure Act does not apply to the instant case, because the immigration proceedings involved were initiated prior to the effective date of the Act

The Administrative Procedure Act, *supra*, does not apply to the instant case because the deportation proceedings herein involved were initiated prior to the effective date of the Act. See *Harisiades v. Shaughnessy*, 342 U. S. 580, wherein the Supreme Court said (342 U. S. at 583, note 4):

Petitioner Harisiades and appellant Coleman contend that the proceedings against them must be nullified for failure to conform to the requirements of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1001, *et seq.* However, § 12 of the Act, 60 Stat. 244, 5 U. S. C. § 1011, provides that " * * * no procedural requirement shall be mandatory as to any agency proceedings initiated prior to the effective date of such requirement." The proceedings against Harisiades and Coleman were instituted before the effective date of the Act.

The warrant of arrest against appellant was issued on August 4, 1937 and served on August 23, 1937 (Imm. File, Warrant of Arrest, August 4, 1937; Imm. File, Report of Hearing, August 23, 1937). Hence, it is clear from the record that the provisions of the Administrative Procedure Act have no application in the instant case.¹⁷ The contentions advanced by ap-

¹⁷ The Administrative Procedure Act was approved on June 11, 1946, to be effective at certain specified times in the future. 60 Stat. 244, 5 U. S. C.

pellant that the administrative proceedings in the instant case were instituted on August 7, 1947 because, on that date, the warrant of arrest became *functus officio* as to the *de novo* proceedings, must necessarily fail. It is apparent from the record that the Board of Immigration Appeals merely said that " * * * the outstanding order and *warrant of deportation* are withdrawn and the case reopened for proceedings *de novo* in accordance with the foregoing" (Imm. File, August 7, 1947). [Emphasis added.]¹⁸ The Board simply directed that proceedings *de novo* be conducted based on the warrant of arrest which was issued on August 4, 1937, which warrant of arrest was, on August 7, 1947, and still is, in effect.¹⁹

III

Further assuming, arguendo, that habeas corpus were not the sole method of attacking an outstanding order of deportation and that the Administrative Procedure Act could apply to the instant case, the lower court was correct in dismissing the complaint since no error was committed during the course of the administrative proceedings

(a) There has been no error committed as a result of the delay in deporting appellant. The record reveals that deportation was delayed due to the difficulty in obtaining the

§ 1011. See *Wong Yang Sung v. McGrath*, 339 U. S. 33 at 45, note 25, to the effect that the initial step in a deportation case is the investigation by the immigration inspector, which is followed by the issuance of the war-

¹⁸ It should be noted that appellant was apprised of the fact at the hearing *de novo*, that the warrant of arrest was the basis for the deportation proceedings (Imm. File, Report of Hearing, January 29, 1948, at p. 2) :

Q—This hearing is being conducted today to give you an opportunity to show cause why you should not be deported on that warrant of arrest. Do you understand?

A—Yes.

¹⁹ Appellant relies on *Carlson v. Landon*, 342 U. S. 524 (1952) (Br. 16-17), which is not in point, since in that case Respondent, Zydok, who had been arrested in August 1949, and then released on bail bond, was rearrested on the original warrant of arrest. In the instant case, appellant has not been rearrested and is presently at liberty under bail.

Appellant also relies on *United States ex rel. Chumura v. Smith* (1927) (D. C. W. D. N. Y.) (Br. 17), which case is also not in point, since there the case concerned an alien who was rearrested following his dismissal pursuant to the grant of a writ of *habeas corpus*.

necessary travel documents and, thereafter, due to the condition of war. (Imm. File, Application for Cancellation of Warrant, March 21, 1950.) The record also reveals that appellant has exerted efforts to prevent deportation, which efforts have thus far been successful. Hence, no reason exists for preventing the carrying out of the order of deportation. *Seif v. Nagle* (1926) (CCA. 9) 14 F. 2d 416 at 417, cert. denied, 273 U. S. 737; *United States ex rel. Gagliardo v. Karnuth* (1946) (CCA. 2) 156 F. 2d 867 at 870;

(b) There has been no error committed as a result of the clerical error whereby the second warrant of deportation stated that one ground for deportation was the finding that appellant had practiced prostitution. The warrant of arrest clearly stated that appellant had been found to manage a house of prostitution. The charge of being an inmate was properly lodged at the first hearing. See *Sung v. McGrath*, 339 U. S. 33 at 46. These two charges constitute the basis for the order of deportation and all the lodged charges were finally rejected. All the charges, both that in the warrant of arrest and those lodged against appellant, related to the same subject matter which would be proved or disproved by the same evidence. See: *Harisiades v. Shaughnessy*, 90 F. Supp. 397, and 90 F. Supp. 431, affirmed, 187 F. 2d 137, affirmed, 342 U. S. 580. In addition, appellant was at all times apprised of the nature of the charges against her²⁰ and there has been no "juggling" of charges and no error.

²⁰ Imm. File, Report of Hearing, September 23, 1937, p. 11:

Q—You are now advised that it appears from the testimony you have just given that, in addition to the charge contained in the Warrant of Arrest in your case, you are liable to deportation from the United States on the charge covered in the code word "Inmate" in that you are found to be an inmate of a house of prostitution. Do you understand this charge?

A—Yes.

See: Imm. File, Report of Hearing, January 29, 1948, p. 13:

Q—In addition to the charge listed in the warrant of arrest, I will lodge the two following charges: That you are in the United States in violation of the Act of February 5, 1917, in that you were an inmate of a house of

(c) Appellant received a full and complete hearing *de novo*, at which time reliable, probative and substantial evidence was received. The record substantiates the findings of the lower court that such evidence supports the charges against appellant (J. A. 15A). It should be noted also that the lower court was correct in declining authority to suspend deportation because the provisions of the pertinent statute clearly place such discretionary authority in the Attorney General and, at the same time, specifically refuse such relief to those aliens, such as appellant, who are found to be connected with prostitution. (J. A. 15A). Title 8, United States Code, Section 155 (c) (d).

CONCLUSION

Wherefore, it is respectfully submitted that the order of the District Court should be affirmed.

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United States Attorney.

WILLIAM R. GLENDON,
LEWIS A. CARROLL,
Assistant United States Attorneys.

prostitution, and the Act of February 5, 1917, in that you had been found assisting a prostitute. Do you understand the charges I have now lodged?

A—Yes.

See: Imm. File, Report of Resumed Hearing, February 10, 1949, at page 77:

Q—You are now placed on notice that in addition to the charge contained in the Warrant of Arrest, and the charges placed against you, it is further charged that you should be deported from the United States on the following grounds: The Immigration Act of February 5, 1917, in that you have been found connected with the management of a house of prostitution. (Fully explained to Respondent.) Do you understand?

A—Yes.